CARDOZO
LAW REVIEW

THE *PENNSYLVANIA* RULE: MURKY WATERS REVISITED

Michael Ben-Jacob

VOLUME 19 MAY 1998 NUMBER 5

NOTES

THE *PENNSYLVANIA* RULE: MURKY WATERS REVISITED

INTRODUCTION

For over 120 years prior to *United States v. Reliable Transfer Co.*,[1] American maritime courts were obliged to apply the rule of divided damages upon the finding of mutual fault by vessels in collision.[2] Numerous presumptions were developed that worked in conjunction with the doctrine of divided damages.[3] The presumption known as the *Pennsylvania* rule was established by the United States Supreme Court in *The Pennsylvania*.[4] The *Pennsylvania* rule interacted with the rule of divided damages by shifting the burden of proof as to causation to a vessel shown to be in violation of a statute intended to prevent collisions.[5] Hence, a vessel that committed a minor infraction of a navigational rule often was forced to divide damages equally with a vessel far more culpable.[6]

This inequitable result, coupled with a variety of historical and logical factors, as well as the Supreme Court's abandonment of the divided damages rule in *Reliable Transfer*, has led some commentators to argue that the *Pennsylvania* rule should be aban-

---

1 421 U.S. 397 (1975) (abandoning the mutual fault equal division of damages rule in favor of a proportionate fault system).

2 *See* Jonathan W. Sager, *Apportioning Maritime Collision Damages: Applying the Rule of* Reliable Transfer, 34 WASH. & LEE L. REV. 1237 (1977). Under this doctrine, established by the Supreme Court in *The Schooner Catharine*, 58 U.S. (17 How.) 170 (1854), a court would aggregate the loss or damage to both vessels and divide them equally. *See* Sager, *supra*, at 1237 nn.1, 3; *see also* JOHN WHEELER GRIFFIN, THE AMERICAN LAW OF COLLISION 558-62 (1949). It should be noted here that the convention in maritime law is to refer to cases by the name of the vessel involved. *See, e.g.*, Warren B. Daly, *The* Pennsylvania *Rule: Charting a New Course for an Ancient Mariner*, 54 B.U. L. REV. 78, 81 (1974). This convention is adhered to throughout this Note.

3 *See* Richard J. Nikas, *Skimming the Surface: A Primer on the Law of Collision*, 9 U.S.F. MAR. L.J. 225, 232 (1996).

4 86 U.S. (19 Wall.) 125 (1873).

5 *See infra* note 57 and accompanying text.

6 *See* William L. Peck, *The* Pennsylvania *Rule Since* Reliable Transfer, 15 J. MAR. L. & COM. 95, 96 (1984). The Court has also noted that the inequities of the rule of divided damages was aggravated when applied in conjunction with the *Pennsylvania* rule. *See Reliable Transfer*, 421 U.S. at 405-06.

doned.[7] In light of the fact that safety at sea is of paramount importance,[8] and the arguments in favor of abandoning the *Pennsylvania* rule are either inapplicable in a proportionate fault regime or fail to fulfill the goal of maritime safety,[9] this Note argues that a presumption as to causation ought to be retained in maritime collision cases where a statutory violation has been shown.

Part I of this Note outlines the historical context in which the *Pennsylvania* rule was enunciated and provides an examination of how the rule has been defined and when the rule applies. Part II discusses other presumptions and rules for apportioning fault in maritime collision cases and how these work in conjunction with the *Pennsylvania* rule. Statutes to which the rule has been applied and circumstances in which the rule has been applied are reviewed in Part III. The evolution of the burden needed to rebut the rule, as well as a discussion of arguments for and against the rule's continued application in maritime law is presented in Part IV. Finally, this Note proposes in Part V that the *Pennsylvania* rule is still a viable means of enforcing adherence to maritime safety statutes. But, over its 125-year history, the rule has been skewed due to the lack of uniformity in its interpretation and application. To address these inconsistencies, it is necessary for the Supreme Court to recast the rule and lessen the burden a party needs to rebut the rule.

I. HISTORICAL BACKGROUND, DEFINITION, AND APPLICATION OF THE RULE

A. *Historical Background*

The concept that liability for maritime collisions is based upon fault dates back as far as *The Digest of Justinian* (533 C.E.).[10] Over time, a variety of maritime codes were compiled, including the "Rhodian Sea Law" (600-800 C.E.), the Code of Oleron (c. 1150 C.E.), the Constitutum Usus of Pisa (c. 1160 C.E.), the Consolato del Mare of Barcelona (c. 1340 C.E.), and the codes of Wisby (1505 C.E.), and Louis XIV (1681 C.E.).[11] Although some of the medieval codes dealt with collisions in a cursory manner, none of them contained extensive rules for the prevention of collisions.[12] It was not until the late eighteenth and early nineteenth centuries that England began to develop laws concerning maritime collision in any substantial manner.[13]

In the United States, the Supreme Court entered into the area of maritime collision law slowly, and did not decide a collision case until 1840.[14] Although the volume of collision cases heard by the Court increased, the majority of nineteenth century opinions simply confirmed the English precedents.[15] Despite these tentative beginnings in the United States, *The Pennsylvania*, decided in 1873, did not create a new principle in American maritime jurisprudence.[16] In *Waring v. Clarke*,[17] the Supreme Court presaged the *Pennsylvania* rule when it stated that a vessel "by whom the law has been disregarded [must] show that the injury done was not the

7 These arguments are addressed *infra* Part IV.

8 *See infra* text accompanying note 302.

9 *See infra* Part IV.B.

10 *See* David R. Owen, *The Origins and Development of Marine Collision Law*, 51 TUL. L. REV. 759, 760 (1977) (discussing *The Digest of Justinian*).

11 *See id.* at 760-64.

12 *See id.* at 760-61. For example, the *Rhodian Sea-Law* contains the oldest known statement of marine collision law. It states:

> If a ship in sail runs against another ship which is lying at anchor or has slackened sail, and it is day, all the collision and the damage regards the captain and those who are on board. Moreover, let the cargo too come into contribution. If this happens at night, let the man who slackened sail light a fire. If he has no fire, let him shout. If he neglects to do this and a disaster takes place, he has himself to thank for it, if the evidence goes to this. If the sailsman was negligent and the watchman dozed off, the man who was sailing perished as if he ran on shallows and let him keep harmless him whom he strikes.

Id. (quoting WALTER ASHBURNER, THE RHODIAN SEA-LAW 110 (1909)). But generally, the *Digest* governed collision cases based upon the ordinary rules of fault, not rules specific to maritime collision. *See id.* at 760-64. Moreover, this statement as well as those of the medieval codes, speak to the apportionment of fault not to the prevention of collisions. *See* Garry Pitts, *Admiralty's* Pennsylvania *Rule*, 24 S. TEX. L.J. 541, 542-43 (1983).

13 *See* Owen, *supra* note 10, at 767-68. In 1798, the regular reporting of decisions by the High Court of Admiralty commenced, and in 1815, in *The Woodrop-Sims*, 165 Eng. Rep. 1422 (L.R. Adm. & Eccl. 1815), the English court set forth the four possible resolutions to collision cases: (1) inevitable accident—no recovery; (2) mutual fault—equal division of damages; (3) sole fault of damaged vessel—no recovery; and (4) sole fault of other vessel—full recovery. This scheme provided an outline for judicial analysis of the large number of maritime collisions cases that had erupted following the industrial revolution, and the coinciding advances in marine technology and trade. *See* Owen, *supra* note 10, at 767-68.

14 *See* Peters v. Warren Ins. Co., 39 U.S. (14 Pet.) 99 (1840) (holding that collision on German waters was an unavoidable accident where action was brought in United States on hull policy for general average contribution); *see also* Owen, *supra* note 10, at 777.

15 *See* Owen, *supra* note 10, at 777. For a detailed discussion of the historical development of maritime and admiralty law in both England and the United States, see 1 BENEDICT ON ADMIRALTY §§ 1-100 (7th ed. rev. 1996). For an examination of the development of maritime and admiralty law in colonial America generally, and in Maryland specifically, see DAVID R. OWEN & MICHAEL C. TOLLEY, COURTS OF ADMIRALTY IN COLONIAL AMERICA: THE MARYLAND EXPERIENCE, 1634-1776 (1995).

16 *See* Daly, *supra* note 2, at 81.

17 46 U.S. (5 How.) 441 (1847).

consequence of it."[18] While this burden falls short of the burden that was ultimately to be imposed in *The Pennsylvania*, the Court took a definitive step in the direction of raising the standard to which a violator would be held in the 1868 case *The Grace Girdler*.[19] There, the Court stated: "[I]t is incumbent on [the vessel in violation] to show that such fault had in no degree the relation of cause and effect to the accident."[20] Similarly, in the 1872 case *The Ariadne*,[21] the Supreme Court used this locution: "Every doubt as to the performance of the duty, and the effect of non-performance, should be resolved against the vessel sought to be inculpated until she vindicates herself *by testimony conclusive to the contrary*."[22]

The facts of *The Pennsylvania* were these: In 1869, the British sailing ship the *Mary Troop*, a bark, was sailing through a dense fog 200 miles off Sandy Hook, New Jersey, bound from Scotland to New York.[23] The fog limited visibility to fifty feet.[24] The *Mary Troop* was moving at about one mile per hour.[25] Under these circumstances, the then-applicable statute governing fog signals required that sailing ships underway use a foghorn.[26] The *Mary Troop* was equipped with a bell and a foghorn, but instead of using the foghorn, the lanyard rang the bell from fifteen to twenty times a minute.[27] Suddenly, the crew heard the whistle of a steamer whose bow then appeared a short distance off.[28]

The steamer proved to be *The Pennsylvania*, a vessel weighing 2388 tons, measuring 341 feet in length, and traveling at seven knots per hour.[29] Unable to avoid contact, *The Pennsylvania* struck the *Mary Troop* on her port side, cutting the smaller ship in half, and resulting in the death of six members of her crew.[30] The owners of the *Mary Troop* libeled *The Pennsylvania* in the District

18 *Id.* at 465.

19 74 U.S. (7 Wall.) 196 (1868); *see also* GRIFFIN, *supra* note 2, at 472.

20 *The Grace Girdler*, 74 U.S. at 203 (citing Waring v. Clark, 46 U.S. (5 How.) 441 (1847)).

21 80 U.S. (13 Wall.) 475, 479 (1872); *see also* Pitts, *supra* note 12, at 544.

22 80 U.S. at 479 (emphasis added).

23 The Pennsylania, 86 U.S. (19 Wall.) 125, 125-26 (1873).

24 *See id.* at 126.

25 *See id.* at 127.

26 *See id.* at 126 (citing Act of Apr. 29, 1864, ch. 69, 13 Stat. 58, 60 (repealed 1926)). The Act required that a steamship under way use a steam whistle, that a sailing ship under way use a foghorn, and that a steamship or sailing ship not under way use a bell.

27 *See id.* at 127.

28 *See id.*

29 *See id.*

30 *See* Nicholas J. Healy & Joseph C. Sweeney, *Establishing Fault in Collision Cases*, 23 J. MAR. L. & COM. 337, 338 (1992).

Court for the Eastern District of New York and in England.[31]

The district court held the steamer to be liable for the whole loss,[32] and this ruling was affirmed by the circuit court.[33] The Supreme Court held, in an opinion delivered by Justice Strong, that the damages were to be divided between the two vessels since both vessels were shown to be at fault.[34] In the course of his opinion Justice Strong enunciated what was to become known as the *Pennsylvania* rule in the following manner:

> But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship [in violation to] show[] not merely that her fault might not have been one of the causes, or that it probably was not, *but that it could not have been.* Such a rule is necessary to enforce obedience to the mandate of the statute.[35]

Since 1874, *The Pennsylvania* has become one of the most

31 The English courts admitted that the bark violated the law by sounding the bell instead of the foghorn, but nonetheless found the steamer liable for the whole loss, given its excessive rate of speed. *See The Pennsylvania*, 86 U.S. at 128 (citing The Pennsylvania, 23 L.T.R. 55 (P.C. 1870)).

32 *See* The Pennsylvania, 19 F. Cas. 180 (E.D.N.Y. 1870) (No. 10,947), *aff'd*, 19 F. Cas. 184 (C.C.E.D.N.Y. 1872) (No. 10,950). David R. Owen has brought to light a rather interesting historical footnote. *See* David R. Owen, *Admiralty Practice in the 19th Century—A Little Family Party: An Historical Footnote to Professor Tetley's Article*, 13 J. MAR. L. & COM. 147, 147-48 (1982). The firm of Benedict & Benedict, New York City, represented the owners of the *Mary Troop*. *See id.* The partners were Erastus C. Benedict, who wrote the first edition of *Benedict on Admiralty* in 1850, and his nephew Robert Benedict. *See id.* Robert's brother, Charles L. Benedict, became the first United States District Judge for the Eastern District of New York in 1865, and Robert acted as court reporter. *See id.* Not surprisingly, Judge Charles L. Benedict decided the case in favor of his uncle and brother. *See id.* Owen also points out that neither the district court nor the circuit court mentioned the presumption for which the case later became famous. *See id.* at 148.

33 *See* The Pennsylvania, 19 F. Cas. 184 (C.C.E.D.N.Y. 1872) (No. 10,950).

34 The *Mary Troop* was at fault for using a bell instead of a fog horn as required by statute and *The Pennsylvania* was at fault for traveling at an "undue rate of speed." *The Pennsylvania*, 86 U.S. at 134-35.

35 *Id.* at 136 (emphasis added). It has been noted that the Supreme Court relied, inter alia, upon an erroneous reading of section 29 of the British Merchant Shipping Act of 1862. *See* William Tetley, *The* Pennsylvania *Rule—An Anachronism?* The Pennsylvania *Judgment an Error?*, 13 J. MAR. L. & COM. 127, 131-32 (1982). Nonetheless, by the time of *The Pennsylvania* decision the law in England was the same as that pronounced by the Supreme Court. *See* HERBERT R. BAER, ADMIRALTY LAW OF THE SUPREME COURT 321 n.3 (3d ed. 1979). Today the rule is considered a "characteristic feature" unique to American maritime jurisprudence. *See* Peter Thompson, *State Courts and State Law: A New Force in Admiralty?*, 8 U.S.F. MAR. L.J. 223, 228 n.25 (1996). For further discussion of the arguments raised by Tetley, see generally *infra* Part IV and text accompanying notes 265-70.

frequently cited maritime decisions of the Supreme Court.[36] It has been suggested that the principle restated in *The Pennsylvania* "was undoubtedly a judicial response to the grave risks encountered by seamen, shipowners and cargo owners alike from collisions at sea."[37]

B. *Defining and Applying the Rule*

Despite the rule's longevity and frequent citation as precedent, how the rule was intended to function is somewhat unclear. Generally, courts have limited their comments as to the functioning of the rule to statements such as "[t]he Rule creates a shift in the burden of proof as to causation,"[38] but it is not a "rule of liability."[39] Others have understood that the rule does not establish fault; rather, it shifts the burdens of persuasion on the issue of causation to the party who violated a legislative mandate.[40]

Some courts have described the rule as a "rule of evidence" which does not affect the substantive rights of the parties, but merely shifts the burden of proof.[41] Similarly, Griffin in *The American Law of Collision* states that under the rule the guilty vessel "has the burden of going forward with such evidence" as would show that the statutory fault was not a contributing fault, but the violator does not incur the burden of persuasion.[42] Based upon this view, some practitioners have argued that the promulgation of the Federal Rules of Evidence, and specifically Rule 301,

36 *See* Richard H. Brown, Jr., *General Principles of Liability*, 51 TUL. L. REV. 820, 828 (1977). Garry Pitts states that *The Pennsylvania* is in fact the most frequently cited admiralty case decided by the Supreme Court, and has been cited in over 500 decisions since 1874. *See* Pitts, *supra* note 12, at 541 n.2.

37 Daly, *supra* note 2, at 81.

38 Garner v. Cities Servs. Tankers Corp., 456 F.2d 476, 480 (5th Cir. 1972) (quoting Green v. Crow, 243 F.2d 401, 403 (5th Cir. 1957)). The problem with statements such as these is that the term "burden of proof" encompasses both the burden of production and the burden of persuasion. *See* 2 MCCORMICK ON EVIDENCE 425 (John William Strong ed., 4th ed. 1992). The Court's language in *The Pennsylvania* is unclear as to whether one or both burdens were intended. *See supra* text accompanying note 35.

39 *E.g.*, *Green*, 243 F.2d at 403.

40 *See, e.g.*, Orange Beach Water, Sewer & Fire Protection Auth. v. M/V Alva, 680 F.2d 1374, 1381 (11th Cir. 1982); *see also* 2 THOMAS J. SCHOENBAUM, ADMIRALTY & MARITIME LAW § 14-3, at 265 (2d ed. 1994).

41 *See, e.g.*, The Aakre, 122 F.2d 469, 474 (2d Cir. 1941) (citing The Martello, 153 U.S. 64, 74 (1894), and Lie v. San Francisco & P.S.S. Co., 243 U.S. 291, 298 (1917)); *see also* Robert J. Zapf, *The Growth of the* Pennsylvania *Rule: A Study of Causation in Maritime Law*, 7 J. MAR. L. & COM. 521, 525-29 (1976).

42 GRIFFIN, *supra* note 2, at 41; *cf.* GRANT GILMORE & CHARLES BLACK, THE LAW OF ADMIRALTY 494 (2d ed. 1975).

which sets forth the general burdens of persuasion,[43] brings the *Pennsylvania* rule into conflict with the federal statute and, therefore, has been overridden.[44] But courts addressing this question have rejected the argument that the rule conflicts with or has been overridden by the Federal Rules of Evidence.[45] In *Self v. Great Lakes Dredge & Docks Co.*,[46] the United States Court of Appeals for the Eleventh Circuit stated that "the adoption of the Federal Rules did not modify the substantive burdens and presumptions long established in admiralty law."[47] This statement necessitates that, in the court's view, the rule is either one of substantive law or a "presumption," but not a rule of evidence. Commentators have in fact categorized the rule as a presumption.[48]

In his dissent in *The Aakre*,[49] Judge Jerome Frank took the view that the rule is "one of procedure, not of substantive law."[50] In accord with this view, the United States Court of Appeals for the Fifth Circuit stated generally that "[t]he law as to the burden of proof is a matter of substance, and the substantive law of a case does not change as the trial proceeds."[51] But the *Pennsylvania* rule "announces a practical presumption . . . a rule of reasoning by the courts . . . [that if a violation of a safety statute is shown] the courts

43 Federal Rule of Evidence 301, titled "Presumptions in General Civil Actions and Proceedings," states:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

FED. R. EVID. 301.

44 *See, e.g.*, Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540, 1555 n.14 (11th Cir. 1987) (citing plaintiff's brief).

45 *See, e.g.*, Hood v. Knappton Corp., Inc., 986 F.2d 329, 331 (9th Cir. 1993) (recognizing "that admiralty law stands apart from other areas of federal law" and therefore presumptions that shift the burden of proof, such as the *Pennsylvania* rule, are not affected by the Federal Rules of Evidence).

46 832 F.2d 1540 (11th Cir. 1987).

47 *Id.* at 1555 n.14; *see also* Jones v. River Parishes Co., 686 F.2d 1129, 1133 (5th Cir. 1982).

48 *See* Healy & Sweeney, *supra* note 30, at 338; 2 SCHOENBAUM, *supra* note 40, § 14-3, at 264; Sager, *supra* note 2, at 1242. Although the *Pennsylvania* rule is a rule that creates a presumption, it "should not be confused with a statutory presumption, contrary to which no proofs may be received." The Victor, 153 F.2d 200, 204 n.4 (5th Cir. 1946); *see also* John F. Meadows & George J. Markulis, *Apportioning Fault in Collision Cases*, 1 U.S.F. MAR. L.J. 1, 24 (1989) (noting that the *Pennsylvania* rule is a nonstatutory presumption).

49 122 F.2d 469 (2d Cir. 1941).

50 *Id.* at 476 (Frank, J., dissenting).

51 *The Victor*, 153 F.2d at 204 (footnote omitted).

will presume that such violation was the cause of the collision."[52]

In *Ishizaki Kisen Co. v. United States*,[53] the United States Court of Appeals for the Ninth Circuit rejected the application of the rule to a collision in foreign waters between a United States vessel and Japanese vessel. The court stated further that the rule should not be,

> considered a part of the procedural law of the forum. Were the Rule designed merely to shift to the violator of the statutory rule the burden of going forward with the evidence its characterization as "procedural" would be proper. The Rule, however, does much more. Its effect has been described as follows:
>
> "The shift in burden resulting from the Pennsylvania Rule is twofold. Not only must the violator meet the burden of producing evidence to counter the presumption of causation, but he must also persuade the trier of fact that his explanation should be adopted" . . . .
>
> . . . .
>
> We conclude, therefore, that the Pennsylvania Rule is more akin to substantive law than to rules of procedure.[54]

In light of the foregoing evidence, some commentators have concluded that the rule "is not a procedural device, but a rule of substantive law; its application *vel non* should therefore generally depend on the law governing the other substantive aspects of the collision."[55] Another commentator, however, has concluded that the United States Court of Appeals for the Second Circuit's view that the rule is a procedural device that "is not an absolute presumption," but "merely shifts the burden of proof," is the better considered view.[56]

Despite the ambiguity as to whether the rule was meant to function as a rule of evidence, procedure, substantive law, or merely as a presumption, there are certain points upon which courts and commentators generally agree. The rule is limited to violations of statutes intended to prevent collisions and the injury that actually occurred.[57] Also, the statute involved must delineate

---

52 *Id.*

53 510 F.2d 875 (9th Cir. 1975).

54 *Id.* at 880-81 (citations and footnotes omitted) (quoting Daly, *supra* note 2, at 80).

55 Healy & Sweeney, *supra* note 30, at 347.

56 *E.g.*, Pitts, *supra* note 12, at 584.

57 *See, e.g.*, United States v. Nassau Marine Corp., 778 F.2d 1111, 1116 (5th Cir. 1985) (finding that failure to remove wreck pursuant to wreck statute caused second vessel to strike wreckage and sink); *see also, e.g.*, Folkstone Maritime, Ltd. v. CSX Corp., 64 F.3d 1037 (7th Cir. 1995) (finding that failure of bridge operator to adhere to Army Corps of Engineers regulation caused collision).

a precise and clearly defined duty.[58] Generally, it has been explained that in order to apply the rule, the following criteria must be met: (1) proof by a preponderance of the evidence of violation of a statute or regulation that imposes a mandatory duty; (2) the statute or regulation must involve marine safety or navigation; and (3) the injury suffered must be of a nature that the statute or regulation was intended to prevent.[59]

II. MARITIME PRESUMPTIONS AND RULES FOR APPORTIONING FAULT

In order to help courts better determine which party was at fault in a collision, numerous presumptions and rules have been developed in maritime law for the determining and apportioning of fault.[60] Generally, if a moving vessel strikes an anchored vessel or a stationary object, the moving vessel is presumed to be at fault.[61] There is a similar presumption against a drifting vessel that strikes an anchored vessel or stationary object.[62] Griffin lists seven other presumptions that courts have used to help determine fault

---

58 In *In re Marine Sulphur Queen*, 460 F.2d 89, 98-99 (2d Cir. 1972), an action was brought to limit damages resultant from a ship lost at sea. It was held that ABS rules for spacing of ship bulkheads call for interpretation and judgment in application and therefore do not provide a clearly defined duty to which the rule may apply. Similarly, in *E.A. Anthony v. International Paper Co.*, 289 F.2d 574, 580-81 (4th Cir. 1961), a motor boat was capsized by defendant's swells. It was held that the rule does not apply because the requirement of a proper lookout was not clearly mandated given the facts of the case. In *Olympia Sauna Compania Naviera, S.A. v. United States*, 604 F. Supp. 1297, 1305 (D. Or. 1984), the district court held that Coast Guard mispositioning of buoys that marked reef only violated statutes of a general nature, hence, the rule did not apply. *See also* Zapf, *supra* note 41, at 531.

59 *See Nassau Marine Corp.*, 778 F.2d at 1116-17; Daly, *supra* note 2, at 110; Sager, *supra* note 2, at 1242-44; 2 SCHOENBAUM, *supra* note 40, § 12-3, at 726.

60 These presumptions are judicial creations. The only statutory presumption in United States maritime collision jurisprudence was created by the Standby Act, ch. 875, § 1, 26 Stat. 425 (1890) (repealed 1983). Today, although there is a statutory duty imposed upon a captain to "stand by" after a collision in order to assist, there is no statutory presumption created against a vessel if the captain fails to do so. *See* 46 U.S.C. §§ 2303-2304 (1994); *see also* Meadows & Markulis, *supra* note 48, at 24 (noting that the *Pennsylvania* rule is a nonstatutory presumption). *See generally* Nikas, *supra* note 3.

61 *See* The Oregon, 158 U.S. 186, 192-93 (1895) (establishing the presumption known as "the *Oregon* rule"); *see also* Folkstone Maritime, Ltd. v. CSX Corp., 64 F.3d 1037 (7th Cir. 1995) (vessel strikes bridge); Great Am. Ins. Co. v. Tug "Cissi Reinauer," 933 F. Supp. 1205, 1217 (S.D.N.Y. 1996) (ice pushed into stationary marina and houseboat). This presumption generally is known as the *Oregon* rule. *See, e.g.*, City of Boston v. S.S. Texaco Texas, 773 F.2d 1396, 1397-98 (1st Cir. 1985).

62 *See* The Louisiana, 70 U.S. (3 Wall.) 164 (1865). Accordingly, this presumption has become known as the *Louisiana* rule. *See, e.g.*, Hood v. Knappton Corp., 986 F.2d 329, 331 (9th Cir. 1993) (log raft negligently set adrift collides with two vessels).

in maritime collisions.[63] Griffin further states that "[s]uch 'presumptions' are, of course, not rules of law or even of evidence. They merely express inference of fact, based on experience and probabilities . . . . They do not alter the ultimate burden of proof."[64] In dealing with the numerous presumptions and rules in maritime law, courts have noted that "the same set of facts may give rise to two conflicting presumptions, the weaker of which must give way."[65] So, when the presumption created by *The Pennsylvania* has come into conflict with the presumption created by *The Oregon*,[66] the *Pennsylvania* rule has taken precedence.[67] Other presumptions and rules for apportioning fault that are worth mentioning in the context of the *Pennsylvania* rule are the doctrines of "last clear chance,"[68] "inscrutable fault," and "inevitable accident,"[69] as well as the condition/cause distinction,[70] the major-minor fault rule,[71] and error in extremis.[72]

A. *Last Clear Chance*

The last clear chance rule exonerates a vessel guilty of a prior fault if the other vessel, being aware of the dangerous condition, had the opportunity to avoid the collision but failed to do so.[73] But it has been questioned if this doctrine truly exists in maritime law.[74] In the wake of *Reliable Transfer*, however, it is clear that if the rule ever existed it has been eliminated.[75] Therefore, any effect the doctrine of last clear chance may have had on the application of

63 *See* GRIFFIN, *supra* note 2, at 39-43.
64 *Id.* at 43.
65 The Victor, 153 F.2d 200, 204 (5th Cir. 1946).
66 *See id.* The stationary vessel, which would normally be exonerated under the *Oregon* rule, failed to adhere to a maritime safety statute intended to prevent collisions.
67 *See id.*
68 *See infra* Part II.A.
69 *See infra* Part II.B.
70 *See infra* Part II.C.
71 *See infra* Part II.D.
72 *See infra* Part II.E.
73 *See, e.g.*, Matton Oil Transfer Corp. v. The M/T Greene, 129 F.2d 618, 620 (2d Cir. 1942).
74 *See* Board of Comm'rs v. M/V Agelos Michael, 390 F. Supp. 1012, 1016 (E.D. La. 1974); *see also* GILMORE & BLACK, *supra* note 42, at 494 n.47; Brown, *supra* note 36, at 836-37.
75 *See* William Tetley, *Division of Collision Damages: Common Law, Civil Law, Maritime Law, and Conflicts of Law*, 16 TUL. MAR. L.J. 263, 271-72 (1992); *see also* Jack C. Rinard, *Collision*, *in* THE FLORIDA BAR CONTINUING LEGAL EDUCATION, MARITIME LAW AND PRACTICE 235, 244 (1980); David R. Owen & M. Hamilton Whitman, Jr., *Fifteen Years Under* Reliable Transfer*: 1975-1990 Developments in American Maritime Law in Light of the Rule of Comparative Fault*, 22 J. MAR. L. & COM. 445, 458 (1991).

the *Pennsylvania* rule no longer needs to be addressed.

B. *Inscrutable Fault/Inevitable Accident*

Established in *The Jumna*,[76] the doctrine of inscrutable fault has been restated in the following manner: Where "a collision clearly resulted from human fault but the court is unable to locate it or allocate the fault among parties," each side will bear its own loss.[77] But these cases are extremely rare.[78] An analogous doctrine in which each party bears its own loss is that of inevitable accident.[79] A collision that occurs as a result of an act of God, through no fault or negligence of either party, is defined as an "inevitable accident."[80] Since no one is responsible for a collision over which human skill and care have no control, the loss rests where it falls.[81]

It is submitted that the *Pennsylvania* rule cannot properly come into conflict with either of these two doctrines. The rule does not conflict with the doctrine of inevitable accident because in such an instance the court is unable to locate a fault that can be said to have caused the collision. If a party is shown to be in statutory violation, as is necessary to implement the *Pennsylvania* rule, the court is not "unable to locate"[82] a causal fault, and the collision cannot be said to have been one of inscrutable fault.

The same reasoning holds true of the doctrine of inevitable accident. A collision can only be properly characterized as one of inevitable accident if neither party is shown to be at fault; this presumably includes a statutory violation. Hence, the *Pennsylvania* rule cannot properly come into conflict with the doctrine of inevitable accident.

C. *The Condition/Cause Distinction*

At times, courts have categorized the violation of a statute too remote from the collision to be considered a legally contributory cause as a "condition" which does not call the *Pennsylvania* rule

76 149 F. 171, 173 (2d Cir. 1906); *see* Meadows & Markulis, *supra* note 48, at 20. *But see* Steven B. Chameides, *Inscrutable Fault in Collision Litigation*, 9 J. MAR. L. & COM. 363, 365 (1978) (dating inscrutable fault cases in United States courts as far back as the mid-nineteenth century).
77 Atkins v. Lorentzen, 328 F.2d 66, 69 (5th Cir. 1964).
78 *See* GILMORE & BLACK, *supra* note 42, at 486 n.10.
79 *See* The Grace Girdler, 74 U.S. (7 Wall.) 196 (1868).
80 Meadows & Markulis, *supra* note 48, at 21.
81 *See* Rinard, *supra* note 75, at 243.
82 *Atkins*, 328 F.2d at 69.

into play.[83] This tactic has been employed to alleviate the harshness of the *Pennsylvania* rule when applied in conjunction with the rule of divided damages.[84]

An often cited example of this distinction is the United States Court of Appeals for the Fourth Circuit case of *Tempest v. United States*.[85] There, the *Devil Dog*'s steering mechanism failed, and instead of stopping to make repairs, the vessel attempted to return upstream. The *Tempest II*, navigating downstream and nearing a bridge whose pilings bisected the river, navigated to her starboard into an uncharted passage.[86] Nonetheless, the two vessels collided under the bridge.[87] Although the first vessel was clearly at fault for attempting to navigate with a faulty steering mechanism, it was argued that the *Tempest II* had violated the Narrow Channel Rule[88] and was therefore subject to the *Pennsylvania* rule.[89] The Fourth Circuit held that since the position of the *Tempest II* did not mislead the *Devil Dog* in any way, and there was no showing that the *Devil Dog* relied upon the *Tempest II*'s compliance with the Narrow Channel Rule, the statutory fault of the *Tempest II* was "no more than a passive condition in the sense that otherwise she would not have been where she was and that her fault made no

[83] *See* The Sagamore, 71 F.2d 958 (2d Cir. 1933); The Steel Inventor, 43 F.2d 958 (2d Cir. 1930); The Morristown, 278 F. 714 (2d Cir. 1922); Long Island R.R. Co. v. Killien, 67 F. 365 (2d Cir. 1895); The Clara, 55 F. 1021 (2d Cir. 1893); GRIFFIN, *supra* note 2, at 476 (citing Standard Towing Corp. v. Michigan Atl. Corp., 122 F.2d 325 (2d Cir. 1941)); *see also* The Gezina, 89 F.2d 300, 304-05 (4th Cir. 1937) (finding excessive length of hawser still attached when preparing to anchor was a condition that could not have contributed to the collision).

[84] *Cf.* Tetley, *supra* note 35, at 140:

> To alleviate the harshness of the Pennsylvania Rule, the courts have occasionally overlooked an earlier fault of one vessel where it could be shown that the loss would have occurred regardless of the violation. In these cases the courts have characterized the statutory violation as a "condition" and not a "cause" of the accident.

It is presumed that the "harshness" referred to here is the rule's application in conjunction with the doctrine of mutual fault equal division of damages. *See supra* text accompanying note 6. For discussion of how this distinction mirrors the "last clear chance" doctrine, see Brown, *supra* note 36, at 830; Daly, *supra* note 2, at 86.

[85] 404 F.2d 870 (4th Cir. 1968); *see* Daly, *supra* note 2, at 85; Sager, *supra* note 2, at 1243 n.39; Tetley, *supra* note 35, at 140-41.

[86] *See Tempest*, 404 F.2d at 871.

[87] *See id.*

[88] 33 U.S.C. § 210 (1976) (repealed 1980) provided that a vessel passing through a narrow channel must navigate on the right side of the channel. Here, the former vessel argued that the bridge pilings divided the river into two narrow channels and the *Tempest II* was in violation for navigating on the left side of the channel. Today, rules governing passing procedures through narrow channels are set forth in Inland Rule 9, 33 U.S.C. § 2009 (1994) and COLREGS Rule 9, 33 U.S.C. § 1602 (1994).

[89] *See Tempest*, 404 F.2d at 871-72.

other contribution to the collision, the Pennsylvania Rule does not require that she bear all or a part of the damages."[90]

But it has been persuasively argued that cases such as *Tempest* represent the problems courts face when they misapply the rule.[91] Warren B. Daly, in his article *The* Pennsylvania *Rule: Charting a New Course for an Ancient Mariner*, has stated that instead of,

> applying [the rule] to determine whether the violation could have caused the accident, courts should first determine whether the harm that resulted was the precise harm that the statute or regulation sought to prevent. If the statute was designed to prevent the type of disaster that occurred, the violator is negligent per se under traditional tort principles. The Pennsylvania Rule is then triggered, and proof that the accident would have occurred regardless of the violation will be required to exonerate the violator. If the harm was different, then the violation of the statute should not be used to invoke the Pennsylvania Rule, for such violation is not negligence per se and hence does not breach any duty owed to the injured party.[92]

Hence, it seems that in Daly's view, the court in *Tempest* need not have applied the condition/cause distinction because the Narrow Channel Rule was not intended to prevent collisions such as the one that occurred in that case.[93] In *In re Tug Helen B. Moran*[94] the Second Circuit questioned the validity of the condition/cause distinction. The court noted that:

> Many courts have sought to distinguish between the active "cause" of the harm and the existing "conditions" upon which that cause operated. . . . [I]t is quite impossible to distinguish between active forces and passive situations. . . . If the defendant spills gasoline about the premises, he creates a "condition;" but this act may be culpable because of the danger of fire. When a spark ignites the gasoline, the condition has done quite as much to bring about the fire as the spark; and since that is the very risk which the defendant has created, he will not escape responsibility. . . . "Cause" and "condition" still find occasional mention in the decisions; but the distinction is now almost entirely discredited. So far as it has any validity at all, it must refer to the type of case where the forces set in operation by the defendant have come to rest in a position of apparent

[90] *Id.* at 872.

[91] *See* Daly, *supra* note 2, at 87.

[92] *Id.* Daly points to *In re Tug Management Corp.*, 330 F. Supp. 486 (E.D. Pa. 1971), in support of this analysis.

[93] *See* Daly, *supra* note 2, at 87.

[94] 560 F.2d 527 (2d Cir. 1977).

> safety, and some new force intervenes. But even in such cases, it is not the distinction between "cause" and "condition" which is important, but the nature of the risk and the character of the intervening cause.[95]

In light of this analysis, the condition/cause distinction provides dubious grounds for circumventing the effects of the *Pennsylvania* rule.

In addition to the *Pennsylvania* rule, prior to *Reliable Transfer*, two other doctrines were developed in American maritime law to complement the rule of divided damages; the major-minor fault rule and error in extremis.[96]

D. *Major-Minor Fault*

In *The City of New York*,[97] the Supreme Court established the doctrine that, if a vessel is found guilty of gross negligence in a collision, the *Pennsylvania* rule will not be applied automatically. Rather, if the opposing vessel's infraction can be categorized as a minor one, the grossly negligent vessel will be held solely at fault.[98] There has been much discussion as to the effects of the major-minor fault doctrine on the *Pennsylvania* rule,[99] but in light of *Reliable Transfer* these discussions are now moot.

Since the major-minor fault rule mainly existed to alleviate the harshness of the divided damages rule, the major-minor fault rule has no place in a contributory negligence scheme.[100] In fact, the better considered judicial decisions are of the same opinion.[101]

---

95 *Id.* at 528 n.3.

96 *See supra* text accompanying notes 60-72.

97 144 U.S. 72, 85 (1893).

98 *See id.*

99 Generally, the major-minor fault doctrine served to lessen inequitable results that may have accompanied application of the *Pennsylvania* rule. Under a divided damages scheme, a vessel guilty of a minor statutory fault might be held liable for one half the damages even though the other vessel's actions were far more egregious. Under the major-minor fault doctrine, if one vessel's fault was considered minor in comparison to the other vessel's fault, the vessel in "major" fault would be held liable for the total damages without regard to the presumption created by *The Pennsylvania*. *See* GILMORE & BLACK, *supra* note 42, at 494-96; Daly, *supra* note 2, at 89-93; Dennis A. Goschka, *Goodbye to All That!—The Unlamented Demise of the Divided Damages Rule*, 8 J. MAR. L. & COM. 51, 54-55 (1976); Meadows & Markulis, *supra* note 48, at 17-20; George Rutherglen, *Not with a Bang but a Whimper: Collisions, Comparative Fault, and the Rule of* The Pennsylvania, 67 TUL. L. REV. 733 (1993); Zapf, *supra* note 41, at 529-31.

100 *See* Owen & Whitman, *supra* note 75, at 456; Rinard, *supra* note 75, at 244. *But see* Brown, *supra* note 36, at 837-38 (arguing that the major-minor fault rule ought to be applied in certain instances even after *Reliable Transfer*).

101 *See* Trinidad Corp. v. Steamship Keiyoh Maru, 845 F.2d 818, 824 n.4 (9th Cir. 1988) (holding "the major-minor fault rule . . . was expressly disavowed when the Supreme Court adopted the rule of comparative negligence in maritime collision cases"); Western Pac. Fisheries, Inc. v. Steamship President Grant, 730 F.2d 1280, 1287 (9th Cir. 1984); Getty Oil Co. v. S.S. Ponce De Leon, 555 F.2d 328, 333 (2d Cir. 1977).

E. *Error in Extremis*

Error in extremis was recognized by the Court in *Propeller Genessee Chief v. Fitzhugh*,[102] and only applies when a vessel is faced with a sudden peril or emergency[103] that did not arise as a result of her own fault.[104] Under this doctrine, if a vessel takes a mistaken action in reaction to a dangerous situation negligently created by another vessel, the former vessel will be exonerated. But "no emergency will excuse the absence of all clear thinking; after all, men, charged with responsibilities of command, must not be wholly incapacitated for sound judgment when suddenly thrust into peril."[105]

In *Green v. Crow*,[106] the Fifth Circuit dealt with the issue of which takes precedence when the doctrine of error in extremis conflicts with the *Pennsylvania* rule. It was held that when a vessel takes an action in extremis,[107] even though it may be in technical violation of the rules, the action is not characterized as a fault, and the vessel is not liable. Hence, the *Pennsylvania* rule cannot be applied because, as a matter of law, no statutory fault occurred.[108]

Finally, it has been noted that the many presumptions of American maritime law are,

> [o]ut of step with the laws of most other nations and the international rules relating to collision. . . . [T]he various presumptions of fault seem relics of an earlier time when the law of collision was beset with unrealistic rules (such as divided damages), and there were only rudimentary means of gathering evidence and assembling facts. It would be helpful to clear the underbrush of presumptions and bring the United States law into conformity with international practice.[109]

But this statement in fact lends support to the contention that

---

102 53 U.S. (12 How.) 443, 461 (1852); *see also* BAER, *supra* note 35, at 224-25 n.5.

103 *See, e.g.*, National Bulk Carriers v. United States, 183 F.2d 405, 408 (2d Cir. 1950).

104 *See, e.g.*, Bucolo Inc. v. S/V Jaguar, 428 F.2d 394, 396 (1st Cir. 1970).

105 Cuba Distilling Co. v. Grace Lines Inc., 143 F.2d 499, 499 (2d Cir. 1944).

106 243 F.2d 401 (5th Cir. 1957).

107 In this instance the vessel turned to port in an effort to avoid collision but failed to signal before doing so. *See id.* at 402.

108 *See Green*, 243 F.2d at 403-04. Others argue that the rejection of divided damages has eliminated the need to apply the in extremis doctrine. *See* Goschka, *supra* note 99, at 68. *But see* Owen & Whitman, *supra* note 75, at 457-58 (arguing that the doctrine is properly applied even after *Reliable Transfer*).

109 2 SCHOENBAUM, *supra* note 40, § 12-3, at 729 n.29 (citing Healy & Sweeney, *supra* note 30, at 347-48).

those presumptions that still exist in maritime law ought to remain. "All of these presumptions, in the final analysis, are mere aids to the court in getting at the right of the matter, and their relative weight must depend upon the circumstances of the particular case."[110] Today, since means of gathering evidence and assembling facts are more advanced, presumptions such as these, based upon experience and probabilities, are more easily rebutted.[111] And, in the absence of rebuttal evidence, the experience and probabilities which gave rise to the presumption are still valid and may be relied upon by the court.[112]

III. STATUTES AND CIRCUMSTANCES IN WHICH THE RULE HAS BEEN APPLIED

A. *Statutes to Which the Rule Has Been Applied*

1. *Maritime Statutory Scheme in the United States*

By its own terms, the *Pennsylvania* rule applies only in instances where it has been shown, by a preponderance of the evidence, that a vessel committed a statutory violation.[113] In describing the contours of the rule's application, the Supreme Court in *The Pennsylvania* stated that the burden of proof as to causation shifts to the vessel that was in "violation of a statutory rule intended to prevent collisions."[114] In the United States, maritime law is governed by a statutory scheme designed to provide for the protection and safety of life and property.[115]

Prior to 1976, there were three sets of navigation rules governing domestic waters set forth in the United States Code.[116] In

110 Coyle Lines v. United States, 195 F.2d 737, 739 (5th Cir. 1952); *see also infra* Part III.

111 *See* 2 SCHOENBAUM, *supra* note 40, § 12-3, at 729.

112 Of course, one may argue that the *Pennsylvania* rule is distinguishable from the foregoing presumptions in that it creates a presumption that is not so easily dismissed.

113 *See supra* text accompanying note 35.

114 86 U.S. (19 Wall.) 125, 136 (1873).

115 *See* The Sunnyside, 91 U.S. 208, 222 (1875). This proposition has been reiterated by courts on numerous occasions. *See, e.g.*, City of New York v. Morania No. 12, Inc., 357 F. Supp. 234, 240 (S.D.N.Y. 1973).

116 These rules referred to four geographical areas: (1) the Great Lakes Rules, 33 U.S.C. §§ 241-295 (1976) (repealed 1980), applicable to vessels on those lakes and connecting tributaries; (2) the Western Rivers Rules, 33 U.S.C. §§ 301-356 (1976) (repealed 1980), applicable to vessels on the Mississippi River and its tributaries; (3) the Inland Rules, 33 U.S.C. §§ 151-232 (1976) (repealed 1980), applicable to vessels on all other inland waters within United States jurisdiction; and (4) the International Regulations, 33 U.S.C. §§ 1051-1094 (1976) (repealed 1977), applicable to United States vessels on the high seas. *See* First Nat'l Bank v. Material Serv. Corp., 544 F.2d 911, 914 (7th Cir. 1976).

1980, these rules[117] were, for the most part, repealed and replaced with the Inland Navigational Rules,[118] which apply to vessels in waters anywhere within United States jurisdiction.[119]

Complementing the Inland Rules are The International Rules, developed by the Intergovernmental Maritime Consultive Organization, which culminated in the London Convention on the International Regulations for Preventing Collisions at Sea of 1972.[120] The recommendations of the London Convention were accepted by Executive Order upon which Congress repealed the prior legislation[121] and enacted new legislation effective as of July 15, 1977.[122] These rules are commonly referred to as "COLREGS."[123]

In addition to the Inland Navigational Rules and COLREGS, seaman must be sure to adhere to United States Coast Guard regulations.[124] It is well established that, since Coast Guard regulations are enacted pursuant to statutory authority, they have "the

117 *See* The Great Lakes Rules, 33 U.S.C. §§ 241-295, the Western Rivers Rules, 33 U.S.C. §§ 301-356, and the Inland Rules, 33 U.S.C. §§ 151-232.

118 33 U.S.C. §§ 2001-2073 (1994).

119 33 U.S.C. § 2001(a) states that "[t]hese Rules apply to all vessels upon the inland waters of the United States, and to vessels of the United States on the Canadian waters of the Great Lakes to the extent that there is no conflict with Canadian law." The Inland Navigational Rules are divided as follows:

Part A—General Application
Part B—Steering and Sailing Rules
(1) Conduct of Vessels in Any Condition of Visibility.
(2) Conduct of Vessels in Sight of One Another.
(3) Conduct of Vessels in Restricted Visibility.
Part C—Lights and Shapes
Part D—Sounds and Light Signals
Part E—Exemptions
Subchapter II—Miscellaneous Provisions

33 U.S.C. §§ 2001-2073.

120 *See* Rinard, *supra* note 75, at 251.

121 *See, e.g.*, The International Regulations for Preventing Collisions at Sea, 33 U.S.C. §§ 1051-1094.

122 *See* Rinard, *supra* note 75, at 251.

123 *See, e.g.*, Trinidad Corp. v. Steamship Keiyoh Maru, 845 F.2d 818, 822 (9th Cir. 1988). The 1972 COLREGS, 33 U.S.C. § 1602 (1994), with the exception of the miscellaneous provisions, are divided in the same manner as the Inland Navigational Rules discussed *supra* notes 118-19. In addition, COLREGS contains four annexes on the following topics:

Annex 1—Positioning and technical details of lights and shapes.
Annex 2—Additional signals for fishing vessels fishing in close proximity.
Annex 3—Technical details of sound signal appliances.
Annex 4—Distress signals.

33 U.S.C. § 1602.

124 *See* Belden v. Chase, 150 U.S. 674, 698 (1893).

force of statutory enactment."[125] Hence, the *Pennsylvania* rule has been applied in innumerable cases for violations of the Inland Navigational Rules, COLREGS, Coast Guard regulations, and their statutory predecessors.[126]

The Inland Navigational Rules, COLREGS, and Coast Guard regulations provide guidance for a wide variety of circumstances in maritime law. But the *Pennsylvania* rule has not been applied in every instance where there was a violation of a statute that is maritime in nature. For example, it has been held that the rule should not be applied to a maritime treaty violation.[127] Similarly, "[o]ne of

---

125 *Id.* More recently, the United States District Court for the District of South Carolina explained the reason why the *Pennsylvania* rule applies to Coast Guard regulations in the following manner:

> The Code of Federal Regulations has the same force and effect, as do Acts of Congress; accordingly, any violation of the Code of Federal Regulations can be said to be a "statutory" violation, as opposed to a violation of the general standard of due care. It is only "statutory" fault which invokes the so called "Pennsylvania Rule" of admiralty law.

Magno v. Corros, 439 F. Supp. 592, 598 (D.S.C. 1977) (citation omitted), *rev'd on other grounds*, 630 F.2d 224 (4th Cir. 1980).

126 For a small sampling of the more common instances of the rule's application, see First Nat'l Bank v. Material Serv. Corp., 597 F.2d 1110 (7th Cir. 1979) (improper lookout); Garner v. Cities Serv. Tankers Corp., 456 F.2d 476 (5th Cir. 1972) (failure to adhere to Army Corps of Engineers Permit); Commercial Transp. Corp. v. Martin Oil Serv., 374 F.2d 813 (7th Cir. 1967) (failure to notify Coast Guard of leaky tank); Bradshaw v. The Virginia, 176 F.2d 526 (4th Cir. 1949) (improper lighting); Ranger Ins. Co. v. Exxon Pipeline Co., 760 F. Supp. 97, 98-99 (W.D. La. 1990) (failure to adhere to Army Corps of Engineers Permit); Collins v. Indiana & Mich. Elec. Co., 516 F. Supp. 304 (S.D. Ind. 1981) (failure to yield right of way); Ingram Barge Co. v. Valley Line Co., 470 F. Supp. 140 (E.D. Mo. 1979) (navigating on wrong side of channel); Gasper v. United States, 460 F. Supp. 656 (D. Mass. 1978) (improper lighting); The Conon Forest, 1979 A.M.C. 1205, 1217 (D. Or. 1978) (improper lookout); Kaiser v. Traveler's Ins. Co., 359 F. Supp. 90 (E.D. La. 1973) (improper lighting); Armstrong v. Chambers & Kennedy, 340 F. Supp. 1220, 1246 (S.D. Tex. 1972) (failure to have appropriate licenses); Atlantic Pipe Line Co. v. Dredge Phil., 247 F. Supp. 857 (E.D. Pa. 1965) (failure to adhere to Army Corps of Engineers Permit). For further enumeration of cases in which the rule has been applied, as well as instances in which the burden of the rule has been met, see ALEX L. PARKS, THE LAW OF TUG, TOW AND PILOTAGE 244-46 (1994). For discussion of cases that have met the burden of the rule, see Daly, *supra* note 2, at 84-88.

The Pennsylvania has been cited in over 500 judicial opinions. *See* Pitts, *supra* note 12, at 541 n.2. Of the opinions that apply the rule, 26% have involved improper signaling, 26% have involved excessive speed, 19% have involved improper lookout, and 14% have involved improper lighting. *See id.* at 553-55 nn.91, 93, 95 & 105. For an enumeration of some of the more esoteric acts to which the rule has been applied, see *id.* at 559-60.

127 *See In re* Damodar Bulk Carriers, Ltd., 903 F.2d 675 (9th Cir. 1990). The International Convention for the Safety of Life at Sea, May 25, 1974, 32 U.S.T. 47, T.I.A.S. No. 9700 ("SOLAS"), requires ships carrying high-risk cargo to have specific fire systems on board. Under SOLAS, an "administrator" determines if the cargo is to be categorized as high-risk. In this instance, India had the power of appointing an administrator who had in fact declared the instant cargo to be high-risk. The court noted that, as a treaty, SOLAS had the force of law in the United States, but went on to say that nevertheless they were

the important unresolved issues concerning the Pennsylvania Rule is whether it will be extended to non-collision maritime personal injury cases, especially cases brought pursuant to the Jones Act."[128] In *Pierro v. Carnegie-Illinois Steel Corp.*,[129] the United States Court of Appeals for the Third Circuit held that the rule is inapplicable in Jones Act cases, as did the Second Circuit in *Wilkins v. American Export Isbrandtsen Lines*.[130] In *Mason v. Lynch Brothers Co.*,[131] the Fourth Circuit, however, left open the possibility that the rule might be applied to Jones Act cases by deciding the case on other grounds.

Pointing out that in *Kernan v. American Dredging Co.*[132] the Supreme Court had the opportunity to extend the rule to Jones Act cases and failed to do so, various judges have persuasively argued that since, unlike the *Pennsylvania* rule, the Jones Act applies regardless of whether the injury suffered is of the type the statute was designed to prevent,[133] application of the *Pennsylvania* rule to Jones Act cases would nullify this important qualification of the rule.[134] Moreover, under the interpretation of the *Pennsylvania* rule that holds that it only applies when there is a violation of a statute intended to prevent collisions,[135] it would be difficult to sustain the argument that the rule ought to be applied to personal injury regulations. However, in *Reyes v. Vantage Steamship Co.*,[136] the court did in fact extend the rule to Jones Act cases. There the court stated:

> Nothing . . . impairs the principle that . . . in Jones Act cases . . . cause in fact is still necessary. Combining this slight

---

wary of applying the rule of *The Pennsylvania* to a treaty violation rather than a statutory violation, because it would invite other courts to engage in the practice. . . . [and thereby] expose shipowners to unforeseeable liability after they have already received a ruling from their home nation that their vessel complies with the treaty. We believe that such a precedent would neither create good law nor advance a desirable public policy.

Damodar, 903 F.2d at 688.

128 Pitts, *supra* note 12, at 564; *see also* Act of June 5, 1920, ch. 250, § 33, 41 Stat. 1007 (providing that an action may be brought against a shipowner by a seaman who is injured or killed in the course of his duties) (codified as amended at 46 U.S.C. § 688 (1994)).

129 186 F.2d 75, 75-78 (3d Cir. 1950).

130 446 F.2d 480, 486 (2d Cir. 1971).

131 228 F.2d 709, 712 (4th Cir. 1956) (holding that failure to provide statutorily required licensed tanker man, which resulted in plaintiff being injured by an oil spill, would be assessed under general negligence criteria and contributory fault, not as a statutory fault).

132 355 U.S. 426 (1958).

133 *See supra* notes 57 & 59 and accompanying text.

134 *See* Pitts, *supra* note 12, at 566-67.

135 *See supra* note 57 and accompanying text.

136 609 F.2d 140 (5th Cir. 1980).

> standard of causation with the presumption of causation [under the *Pennsylvania* rule] to which the plaintiff is here entitled means that on remand the ship owner must show that the ship's inaction and regulatory violations could not have been even a contributing cause of [the plaintiff's] death.[137]

The disagreement among commentators as to the propriety of applying the rule in personal injury cases brought under the Jones Act[138] becomes more complicated when one considers that the rule has been extended to salvage claims,[139] berthings,[140] and a variety of other non-collision cases,[141] in addition to non-maritime actions.[142] Given these applications and the Fifth Circuit's holding in *Reyes*,[143] there is little precedential argument that can be mustered in support of the contention that the rule should not be further extended to cases in which the policies behind the rule would be advanced.

Less controversial has been the refusal of courts not to extend the rule to instances in which the burden of proof scheme is mandated by statute. In *Automobile Insurance Co. v. United Fruit Co.*,[144] a fire was caused by the negligent manner in which bleaching powder was stored. The cargo owner argued that the shipowner was guilty of statutory fault under the Carriage of Goods by Sea Act ("COGSA"),[145] which provides a burden of proof scheme.[146] The court stated "[w]e are unwilling to allow a

137 *Reyes*, 609 F.2d at 146.

138 *See* Pitts, *supra* note 12, at 564-66:

> [T]he better approach is to exclude the Pennsylvania Rule from maritime personal injury cases, including Jones Act cases .... A wholesale movement of the Pennsylvania Rule into maritime personal injury law would be a major change in the law. The shipowner already faces liability under the Jones Act when his negligence played any part, even the slightest, in producing the seaman's injury or death. To add the burden of the Pennsylvania Rule on top of the Jones Act slightest-degree-of-negligence standard would be tantamount to making the shipowner strictly liable in a great many cases.

But see Daly, *supra* note 2, at 98-105; *see also* 1B BENEDICT, *supra* note 15, § 3, at 152.

139 *See, e.g.*, Waterman S.S. Corp. v. Shipowners & Merchants Towboat Co., 199 F.2d 600 (9th Cir. 1952).

140 *See, e.g.*, Standard Transp. Co. v. Wood Towing Corp., 64 F.2d 282 (4th Cir. 1933).

141 *See infra* Part III.B.4-5.

142 *See infra* Part III.B.6.

143 Notably, *Reyes* was distinguished by the court in that the action focused upon the breach of the shipowner's duty to rescue. *Reyes*, 609 F.2d at 146. Some may point to *Armstrong v. Chambers Kennedy*, 340 F. Supp. 1220, 1243-46 (S.D. Tex. 1972), as another instance where a court has applied the rule within the Jones Act context. But *Armstrong* has been distinguished as "akin to navigation." *See* Pitts, *supra* note 12, at 565.

144 224 F.2d 72 (2d Cir. 1955).

145 46 U.S.C. §§ 1300-1315 (1994).

146 For an excellent outline of what this burden is and when it shifts, see *In re* Ballard Shipping Co., 823 F. Supp. 68 (D.R.I. 1993).

presumption supplied by the doctrine of statutory fault to substitute for proof of cause required by statute."[147] Similarly, it has been held that the rule would not apply where the parties had a prior agreement stipulating that the burden of proof scheme provided by COGSA would apply.[148]

Violation of the Wreck Statute[149] has generally resulted in application of the *Pennsylvania* rule against the violator.[150] However, the Fourth Circuit has held that since the rule only begins to operate if the plaintiff can point to a party as being responsible for the damage, the rule cannot be applied where the owner of the wreck is unknown.[151]

2. *Application to Non-Federal Statutes*

The *Pennsylvania* Court did not limit the rule to violations of federal statutes and, although the issue before the Court was in fact such a violation,[152] subsequent courts have not given the case a narrow reading.[153] Hence, courts have applied the rule in instances involving violations of state and local statues. In *The Amiral*

147 *Automobile Ins. Co.*, 224 F.2d at 75. The Fifth Circuit has recently reaffirmed the contention that the *Pennsylvania* rule does not apply where COGSA provides the burden of proof scheme. *See* Usinas Siderugicas De Minas Geras v. Scinda Steam Navigation Co., 118 F.3d 328, 331 (5th Cir. 1997).

148 *See In re* United States Steel Int'l, Ltd., 1975 A.M.C. 1553, 1568 (Blackiston, Stam, and Brush, Arbs.) (citing Director General of the India Supply Mission v. Steamship Maro, 459 F.2d 1370 (2d Cir. 1972)).

149 33 U.S.C. § 409 (1994) (requiring the owner of a wreck to mark the spot and to remove any obstructions to navigation).

150 *See* United States v. Nassau Marine Corp., 778 F.2d 1111, 1114-15 (5th Cir. 1985); Humble Oil & Ref. Co. v. Tug Crochet, 422 F.2d 602 (5th Cir. 1970); Three Rivers Rock Co. v. M/V Martin, 401 F. Supp. 15 (E.D. Mo. 1975); Ingram Corp. v. Ohio River Co., 382 F. Supp. 481 (S.D. Ohio 1973), *aff'd*, 505 F.2d 1364 (6th Cir. 1974); Kaiser v. Traveler's Ins. Co., 359 F. Supp. 90 (E.D. La. 1973), *aff'd*, 487 F.2d 1300 (5th Cir. 1974).

151 *See* Gosnell v. United States, 262 F.2d 559, 563-64 (4th Cir. 1959). Compare the court's statement that:

> The Pennsylvania rule does not apply where the physical cause of the damage is not known. Any plaintiff . . . must show: (1) the physical cause of his injuries; (2) fault on the part of the person sought to be held responsible; and (3) a causal connection between such fault and the physical cause. The Pennsylvania rule begins to operate after libelant has passed the second stage, but not before.

Id. at 563, with the outline of when the rule begins to operate. *See supra* note 57 and accompanying text.

152 *See* Act of Apr. 29, 1864, ch. 69, art. 10, 13 Stat. 58, 60 (repealed 1926).

153 Some commentators have stated that the rule "seems restricted to the *Federal* statutes covering navigation." GRIFFIN, *supra* note 2, at 475 (emphasis added). The cases cited in this section that apply the rule outside the federal context might lead one to question this contention. In the scheme of cases that consider the rule, however, less than one percent involve violations of state or local rules. *See* Pitts, *supra* note 12, at 556 n.114.

Cecille,[154] for example, a ship struck a moored vessel. The moored vessel was held accountable under the *Pennsylvania* rule for anchoring in the harbor without first obtaining the required permit from the harbor master, as was mandated by Washington law. More recently, a motorboat operator was called to task under the rule for having collided with a barge while operating the motorboat while intoxicated, a violation of Kentucky statutes.[155]

3. *Application to Foreign Vessels and Domestic/Foreign Law*

The *Pennsylvania* rule has also been applied to foreign vessels found to be in violation of domestic law. As noted earlier, *The Pennsylvania* itself concerned a collision between British vessels operating in violation of United States law.[156] The 1897 case, *The Umbria*,[157] provides further evidence that the Supreme Court intended that no distinction be drawn between domestic and foreign vessels that operate in violation of domestic statutes. The British steamship *The Umbria* collided with the French steamship *The Iberia*, about eleven miles from the entrance to New York Harbor. *The Umbria* was traveling too fast given the fog conditions, and *The Iberia* failed to stop or reverse her engines upon hearing *The Umbria*'s warning signal. Both actions were in violation of the Revised International Regulations of 1885.[158] As to the issue of causation, the Court held, inter alia, that "even if [*The Iberia*] were in fault, such fault did not contribute to the collision."[159] Although the Court did not directly cite *The Pennsylvania*, the locution "did not contribute" implies that the Court was concerned that the vessel meet the burden under *The Pennsylvania*, i.e., that the violation "could not" have caused the collision.

That later courts have held foreign vessels to the standard of the *Pennsylvania* rule when found to be in violation of a domestic statute is evidenced by the case of *Commonwealth of Puerto Rico*

154 134 F. 673 (D. Wash. 1905).

155 *See* Collins v. Indiana & Mich. Elec. Co., 516 F. Supp. 304, 309 (S.D. Ind. 1981). For other examples of the rule applied to state laws, see Churchill v. F/V Fjord, 857 F.2d 571 (9th Cir. 1988) (local statute requiring navigation lights); Armour v. Gradler, 448 F. Supp. 741 (W.D. Pa. 1978) (Pennsylvania motorboat statute).

156 *See supra* notes 23-26 and accompanying text.

157 166 U.S. 404 (1897).

158 23 Stat. 438. Article 13 states that "[e]very ship . . . shall in fog, mist, or falling snow go at a moderate speed." *The Umbria*, 166 U.S. at 441. Article 18 states that "[e]very steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary." *Id.*

159 *The Umbria*, 166 U.S. at 421.

v. M/V Zoe Colocotroni.[160] There, a Panamanian oil tanker ran aground and jettisoned 1.5 million gallons of crude oil into the sea.[161] In applying the *Pennsylvania* rule, the court found that the vessel was in violation of the International Convention for Safety of Life at Sea of 1960,[162] which imposed certain requirements on navigational equipment.[163]

Foreign vessels have been held to the *Pennsylvania* rule for violations of foreign law as well. Such a circumstance was addressed by the Court in the case of *Richelieu Navigation Co. v. Boston Marine Insurance Co*.[164] There, a Canadian vessel in Canadian waters was found to be in violation of a Canadian statute requiring moderate speed in fog. In light of this, modern courts have held a Liberian vessel to the standard of the *Pennsylvania* rule where a violation of a Liberian manning statute was shown.[165] In contradistinction to the foregoing, at least one court has concluded that the *Pennsylvania* rule is inapplicable to violations of West German manning statutes because they do not have the "force of law attributable to a Federal Statute."[166]

4. *Application to Non-Navigational Statutes*

It has been submitted that the *Pennsylvania* rule refers only to faults in navigation and ought not to apply to statutes that speak to preliminary matters or conditions.[167] In this vein, courts have had to address the question of whether the rule should be applied in instances where an officer involved in a collision does not possess the licenses required by law. Where a vessel was navigated in a busy harbor by a person without a master's license, the Fourth Circuit held the vessel to the standard of the *Pennsylvania* rule.[168] On the other hand, it has been held that lack of a master's license is not, by itself, a sufficient statutory violation to call the rule into

160 456 F. Supp. 1327 (D.P.R. 1978).

161 *See id.* at 1333.

162 77 Stat. 194 (1963).

163 *See M/V Zoe*, 456 F. Supp. at 1333; *see also In re* Waterstand Marine, Ltd., 1991 A.M.C. 1784 (E.D. Pa. 1988) (applying the *Pennsylvania* rule to Greek vessel for violations of the Inland Navigational Rules).

164 136 U.S. 408 (1890).

165 *See* Navieros Oceanikos, S.A. v. S.T. Mobile Trading, 409 F. Supp. 884, 889 n.2 (S.D.N.Y. 1976); Joseph Navigation Corp. v. Chester, 411 F. Supp. 496, 500 (S.D.N.Y. 1975); *cf. In re* United States Steel Int'l, Ltd., 1975 A.M.C. 1553 (Blockiston, Stam, and Brush, Arbs.) (holding that the Liberian manning statutes are insufficiently clear and mandatory to allow application of the rule).

166 *In re* Bernhard Schulte, 1974 A.M.C. 2472, 2475 (7th Cir. 1973).

167 *See* GRIFFIN, *supra* note 2, at 579; *see also supra* Part II.C.

168 *See* The City of Baltimore, 282 F. 490, 493 (4th Cir. 1922).

play.[169]

Courts have also declined to apply the rule to non-navigational statutes such as the Fire Statute.[170] In *Automobile Insurance Co. v. United Fruit Co.*,[171] the Second Circuit refused to extend the rule to cases under the Fire Statute for losses of cargo because "immunity from liability for fire loss under the Fire Statute is not conditioned upon compliance with other statutes . . . [for that] would serve to emasculate the Fire Statute by diluting the owner's immunity from fire loss liability."[172] In contrast, the United States Court of Appeals for the Seventh Circuit applied the rule in the instance of fire in *Commercial Transport Corp. v. Martin Oil Services, Inc.*[173]

5. *Application in the Absence of a Statutory Obligation*

Interestingly, although courts consistently have reiterated the qualification that the rule applies only to statutory violations,[174] on occasion the rule has been used to shift the burden of proof where there was in fact no statutory violation. A case often cited in support of this proposition is *Afran Transport Co. v. The Bergechief*.[175] In that case, two vessels collided while navigating in a dense fog. Both ships were equipped with functional radar but, even though each ship had only a rough idea of the other's position, failed to make use of the radar. In holding *The Bergechief* to the burden of the *Pennsylvania* rule, the court noted Learned Hand's opinion in *The T.J. Hooper*,[176] which held a ship to be unseaworthy for lack of a radio receiving set, although a radio set was not required by statute, and pointed to Coast Guard regulations that required officers in the merchant marine to pass an examination on the proper use of radar.[177]

The court concluded that this evidence "shows which way the wind blows and [we] have little doubt that a rule requiring radar,

169 *See, e.g.*, Waterman S.S. v. Shipowners & Merchants Towboat Co., 199 F.2d 600 (9th Cir. 1952).

170 46 U.S.C. § 182 (1994) (providing that the owner of a vessel has total exemption from liability for cargo lost by fire except if the fire was caused by the owner's design or neglect).

171 224 F.2d 72 (2d Cir. 1955); *see also supra* notes 141-44 and accompanying text.

172 *Automobile Ins. Co.*, 224 F.2d at 75.

173 374 F.2d 813 (7th Cir. 1967).

174 *See supra* text accompanying notes 57-59.

175 274 F.2d 469 (2d Cir. 1960); *see* 2A BENEDICT, *supra* note 15, at § 87, 8-10 n.5; Rinard, *supra* note 75, at 259.

176 60 F.2d 737 (2d Cir. 1932).

177 *See Afran*, 274 F.2d at 474 n.3.

subject to some limitations and qualifications, will sooner or later be formulated."[178] But this case provides dubious precedent for the proposition that the rule has been applied in the absence of a statutory breach. The court's discussion of radar can easily be viewed as dicta in that the court had already affirmed the lower court's finding of liability based upon the lower court's application of the *Pennsylvania* rule to *The Bergechief* for the statutory violation of failing to have a lookout on the bow.[179]

Judge Learned Hand's opinion in *The Madison*[180] provides a far better example of the rule applied in the absence of a statutory violation. There, with respect to a lookout's failure to report to his captain, the Second Circuit stated that

> the burden is upon [the vessel in violation] to show that his failure did not contribute to the collision. It is true that this failure of the lookout was not a violation of any statutory rule; but we do not distinguish between the burden imposed upon a vessel which violates so stringent a requirement, although it depends only upon customary law . . . .[181]

Similarly, the Second Circuit adopted this view in *Ira S. Bushey & Sons, Inc. v. United States*.[182] There, the court commented that the failure of a vessel to keep a vigilant lookout is a fault so serious that "a guilty vessel can escape from its ordinary consequences only by proving, as in respect to a statutory fault, that it did not and could not have contributed to cause what happened."[183]

But cases such as these seem to be restricted to the Second Circuit, and only as to the issue of failure to have a proper lookout. Moreover, since the present Inland Rules and COLREGS clearly mandate that a ship keep a proper lookout,[184] the implications these cases may have upon the application of the *Pennsylvania* rule are moot.

178 *Afran*, 274 F.2d at 474. Interestingly, use of radar would not be mandated by statute for another 17 years. *See* Rinard, *supra* note 75, at 261.

179 *See Afran*, 274 F.2d at 473.

180 250 F. 850 (2d Cir. 1918).

181 *Id.* at 852 (citations omitted).

182 172 F.2d 447 (2d Cir. 1949).

183 *Id.* at 448; *see also* Rice v. United States, 168 F.2d 219, 220 (2d Cir. 1948).

184 *See* Inland Rule 5, 33 U.S.C. § 2005 (1994); COLREGS Rule 5, 33 U.S.C. § 1602 (1994). The phrasing of the prior Navigational Rules and International Rules led some courts to believe that failure to keep a proper lookout was simply a violation of ordinary due care and not a violation of a mandatory statute that would call the *Pennsylvania* rule into play. *See* Darling v. Scheimer, 444 F.2d 514 (9th Cir. 1971); Anthony v. International Paper Co., 289 F.2d 574 (4th Cir. 1961); Bloomfield S.S. Co. v. Brownville Shrimp Exch., 243 F.2d 869 (5th Cir. 1957); Parker Bros. & Co. v. De Forest, 221 F.2d 377 (5th Cir. 1955).

B. *Circumstances in Which the Rule Has Been Applied*

Although *The Pennsylvania* concerned a collision between two moving vessels in navigable waters, courts have largely focused upon the underlying policy of the rule—to enforce the mandate of the statute and thereby prevent collisions—and have applied the presumption created by the rule in a wide variety of instances.

1. *Strandings*

In *Richelieu Navigation Co. v Boston Marine Insurance Co.*[185] it was held that the rule is applicable in cases of strandings. There, suit was brought, inter alia, to enforce an insurance contract against a vessel that was found to be operating at full speed in a fog without a properly working compass. Since that time, courts have consistently applied the rule in stranding cases.[186]

2. *To Structures Other Than Vessels*

It has been pointed out that "[a]pplication of the rule to structures other than vessels was at one time a debatable question."[187] But the issue is no longer an open one today. In *The Martello*,[188] the Supreme Court stated that the rule "is a presumption which attends every fault connected with the management of the vessel and every omission to comply with a statutory requirement, or with any regulation deemed essential to good seamanship."[189] Based upon this statement, it has been argued that expansion of the rule to collisions with bridges was a logical step.[190] Regardless of the

185 136 U.S. 408, 422 (1890).

186 *See In re* Ballard Shipping Co., 823 F. Supp. 68 (D.R.I. 1993); Commonwealth of Puerto Rico v. S.S. Zoe Colocotron, 456 F. Supp. 1327 (D.P.R. 1978); *see also* Afran Trans. Co. v. United States, 435 F.2d 213 (2d Cir. 1970); The Aakre, 122 F.2d 469 (2d Cir. 1941); The Denali, 112 F.2d 952 (9th Cir. 1940); Flint & P.M.R. Co. v. Marine Ins. Co., 71 F. 210 (E.D. Mich. 1895). Some have pointed out that a careful reading of *Richelieu* shows that the Court based its finding of liability upon a Canadian statute that imposed a burden similar to the *Pennsylvania* rule. *See* Daly, *supra* note 2, at 93 n.91. This reading of *Richelieu* has been accepted by some courts. *See, e.g.*, Ishizaki Kisen Co. v. United States, 510 F.2d 875, 883 (9th Cir. 1975). Nonetheless, the rule has been consistently applied to strandings.

187 Healy & Sweeney, *supra* note 30, at 340. Although the authors do not cite it, it is likely that they referred to cases such as the district court opinion in *In re Tug Helen B. Moran, Inc.*, 420 F. Supp. 1282 (S.D.N.Y. 1976), which stated that the court would limit the rule "to moving ships which were actively or primarily negligent." *Id.* at 1290 (citing *In re* Great Lakes Towing Co., 348 F. Supp. 549 (N.D. Ill. 1972)).

188 153 U.S. 64 (1894).

189 *Id.* at 73.

190 *See* Zapf, *supra* note 41, at 533. One may question, however, the logical connection between a statement which strikes to "the management of a vessel" and "seamanship" and the application of the rule to bridges which are neither "vessels" nor require "seamanship."

questionable logical connection between the Court's statement and the application of the rule to bridges, the rule has in fact been applied to bridges on numerous occasions for failure to comply with building permits and operational regulations.[191]

The rule has been extended beyond bridges as well. In *Atlantic Pipe Line Co. v. Dredge Philadelphia*,[192] a vessel damaged a pipeline under a riverbed which subsequently caused oil to escape and damage governmental shore facilities and vessels. The Atlantic Pipe Line Company was required to meet the burden of the rule for its failure to adhere to its Army Corps of Engineers construction permit by not placing the pipe deep enough.[193]

Similarly, docks, wharfs, piers, fingers,[194] rocks,[195] improperly marked flair pipes,[196] an aerial voltage transmission line,[197] a gas well,[198] a float,[199] a crane,[200] and a gill net[201] found to be in violation of statutory requirements have been made subject to the rule.

3. *Application to Both Parties*

Generally, if both parties in a collision have been shown to be in statutory fault, the rule has been applied to both. An example is

191 *See* 33 U.S.C. § 403 (1994) (requiring that bridges and other structures obtain building permits from the Army Corps of Engineers). For some examples of the *Pennsylvania* rule applied to bridges, see Folkstone Maritime Ltd. v. CSX Corp., 64 F.3d 1037 (7th Cir. 1995); Florida E. Coast Ry. v. Revilo Corp., 637 F.2d 1060, 1064 (5th Cir. 1981); *In re* Tug Helen B. Moran, Inc., 560 F.2d 527, 529 (2d Cir. 1977); *In re* Wasson, 495 F.2d 571, 580 (7th Cir. 1974); Shell Petroleum Co. v. Peschken, 290 F.2d 685, 687 (3d Cir. 1961); Circle Line Sightseeing Yachts, Inc. v. City of New York, 283 F.2d 811, 814 (2d Cir. 1960); The Fort Fetterman, 268 F.2d 27, 28 (4th Cir. 1959); Nassau County Bridge Auth. v. Tug Dorothy McAlister, 207 F. Supp. 167, 171 (E.D.N.Y. 1962); Conners Marine Co. v. New York & Long Branch R.R., 87 F. Supp. 132, 135 (D.N.J. 1950).

192 247 F. Supp. 857 (E.D. Pa. 1965), *aff'd per curiam*, 366 F.2d 780 (3d Cir. 1966).

193 The court stated: "In the present case, the requirement of the forty-five foot depth was obviously intended to avoid just such hazards as eventuated in these law suits." *Id.* at 862. Note that this depth was measured from the surface of the river and would have resulted in the pipe being four feet under the riverbed. *See* Zapf, *supra* note 41, at 537 n.60; *see also* Ranger Ins. Co. v. Exxon Pipeline Co., 760 F. Supp. 97, 98-99 (W.D. La. 1990).

194 *See* Great Am. Ins. Co. v. Tug "Cissi Reinauer," 933 F. Supp. 1205 (S.D.N.Y. 1996); Magno v. Corros, 439 F. Supp. 592 (D.S.C. 1977).

195 *See In re* Tug Ocean Prince, Inc., 436 F. Supp. 907 (S.D.N.Y. 1977).

196 *See* Gele v. Chevron Oil Co., 574 F.2d 243 (5th Cir. 1978).

197 *See In re* Waterstand Marine, Ltd., 1991 A.M.C. 1784 (E.D. Pa. 1988).

198 *See* Mosbacher Prods. Co. v. Louisiana Materials Co., 1981 A.M.C. 1458 (E.D. La. 1980).

199 *See* O'Shaughnessy v. Besse, 389 N.E.2d 1099 (Mass. App. 1979).

200 *See* Board of Comm'rs v. M/V Agelos Michael, 390 F. Supp. 1012 (E.D. La. 1974).

201 *See* Orlando v. Puget Sound Tug & Barge Co., 519 F. Supp. 19 (W.D. Wash. 1980).

found in the Seventh Circuit case *Commercial Transport Corp. v. Martin Oil Service, Inc.*[202] In that case, one party violated the Coast Guard regulations by failing to notify the Coast Guard that it had developed a leak in one of its tanks. The other party also violated the same regulations by failing to have a licensed tanker man[203] on hand at the time of unloading. This carelessness by both parties resulted in a fire, and neither party succeeded in meeting its burden under the rule. Since the fire was of unknown origin, the court divided the damages.

Division of damages, however, has not always been the result when both parties have failed to carry their burden under the rule. For example, in *Lie v. San Francisco & Portland Steamship Co.*,[204] the Court found that where both ships were shown to be in statutory violation and neither vessel could meet the burden of the *Pennsylvania* rule, each party would be responsible for its own damages. In contradistinction, at least some district and circuit courts have held that the rule has no application at all in an instance where both vessels are in violation of a statute and neither can carry the burden under the rule.[205]

4. *Lack of Actual Contact*

Courts have held that the rule does not apply to a vessel which is not itself in collision even though that vessel's statutory violation or negligence may have caused a collision between other vessels.[206] In contrast, where damage is caused by a vessel's swells, the vessel will be held liable,[207] and, if a statutory violation is shown, the nonconforming vessel must meet the burden of the *Pennsylvania* rule.[208] In the same vein, the United States District Court for the Southern District of New York recently confronted the issue of whether the rule is applicable to instances of damage caused by ice.

The facts of *Great American Insurance Co. v. Tug "Cissi Reinauer"*[209] were rather unusual.[210] The plaintiff was the owner of a marina located on a rather precarious bend in the Norwalk River in Connecticut. On several occasions, defendant's tugs attempted to traverse the river when the river was a frozen field of ice. In doing so, the vessels pushed ice into the shorefront marina, thereby causing substantial damage to docks, fingers, piers, and a houseboat. In discussing the possible application of the *Pennsylvania* rule against the tugs, the court held that it was inapplicable because no statutory violation was shown,[211] but strongly suggested that the rule would have been applied if such a violation had been shown.[212]

202 374 F.2d 813 (7th Cir. 1967).

203 *See* discussion of licenses *supra* notes 165-66 and accompanying text.

204 243 U.S. 291, 298 (1917).

205 *See, e.g.*, *In re* Gypsum Carrier, 465 F. Supp. 1050, 1063 (S.D. Ga. 1979); *see also* Trinidad Corp. v. S.S. Keiyoh Maru, 845 F.2d 818, 827 (9th Cir. 1988). George Rutherglen explains that the rule fails to carry an advantage to either vessel if neither can meet the burden because "the burden on each party cancels the other out." Rutherglen, *supra* note 99, at 736.

206 *See* The Agnes, 143 F.2d 964 (2d Cir. 1944); The Nanuet, 55 F.2d 222, 223 (2d Cir. 1932); *see also* Rinard, *supra* note 75, at 243.

207 *See, e.g.*, United States v. Ladd, 193 F.2d 929 (4th Cir. 1952).

208 *See, e.g.*, Sinclair Ref. Co. v. Morania Dolphin, 272 F.2d 192 (2d Cir. 1959).

5. *Non-Collision Cases*

Early in the history of the *Pennsylvania* rule, the Second Circuit applied the rule in a non-collision case. In *The M.M. Chase*,[213] a cargo owner consigned goods to the consignee/libelant for sale on commission. The owner then drew upon the consignee/libelant against the consigned goods and cashed the drafts. Unfortunately, the goods were seized by the sheriff before they reached the consignee/libelant, and taken by creditors of the cargo owner who had attached them pursuant to a court action. The shipmaster was libeled for failing to adhere to state statutes that protected the rights of the consignee.[214] Hence, the shipmaster was required to show that "pursuing the course required by law could not possibly have made any difference."[215] However, commentators have pointed to

209 933 F. Supp. 1205 (S.D.N.Y. 1996).

210 The court stated that it was "aware of only a handful of cases that deal with the issue of damage caused to a stationary object by ice displaced by the movement of another vessel." *Id.* at 1213. Of the five cases mentioned, only the most recent, *R & H Development Co. v. Diesel Tanker, J.A. Martin, Inc.*, 203 A.2d 766 (Conn. Cir. Ct. 1964), applied the *Pennsylvania* rule.

211 *See Great Am. Ins. Co.*, 933 F. Supp. at 1216.

212 The defendants likewise attempted to have the presumption of the rule placed against the plaintiff/marina owner for failing to have the required Army Corps of Engineer's Permit. In response, the court pointed out that prior cases that applied the rule in such instances only did so when the violation resulted in an obstruction to navigable waters. This last distinction is interesting in that it has not been enunciated by prior courts. *See id.* at 1216-17. For a careful analysis of the opinion in *Great American*, see Note, *Breaking New Ice? Southern District of New York Revisits Maritime Collision Law Governing Ice Damage:* Great American Insurance Co. v. Tug Cissi Reinauer, 21 TUL. MAR. L.J. 617 (1997).

213 37 F. 708 (S.D.N.Y. 1889).

214 The state statute provided, inter alia, that timely notice of attachment be given to the consignee. *See id.* at 709.

215 *Id.* at 713.

this case as a misapplication of the *Pennsylvania* rule[216] because the statute involved did not delineate a clearly defined duty.[217] The Second Circuit has also applied the rule in a case involving the death of two seamen who were lost overboard during a storm. The statutory violations concerned the stowage as well as the condition of the life rafts and boats.[218]

Not all circuits have been quick to apply the rule to non-collision cases, however. In *Garner v. Cities Service Tankers Corp.*,[219] the Fifth Circuit recognized that other circuits had applied the rule to non-collision cases but stated "we have found no instance where this court has done so."[220] Therefore, the court declined to extend the rule "from its tort origins" to the present issue of "setting . . . contractual indemnity for breach of workmanlike performance."[221] Interestingly, only one week later the United States District Court for the Southern District of Texas applied the rule to a non-collision tort case in *Armstrong v. Chambers & Kennedy*.[222]

The Fifth Circuit clarified its position as per the application of the rule to non-collision cases in *Candies Towing Co. v. M/V B&C Eserman*.[223] There, the court pointed to its application of the rule to a vessel that lacked a required line throwing device and whose crew failed to make efforts to rescue a man overboard in violation of the maritime rescue doctrine.[224] The court concluded that "beyond doubt . . . the rule of *The Pennsylvania* does apply in non-collision cases."[225]

6. *Non-Maritime Cases*

On rare occasions courts have referred to the *Pennsylvania* rule outside the realm of maritime. In *Baird v. Franklin*,[226] a case

216 *See, e.g.*, Zapf, *supra* note 41, at 534.

217 *See supra* notes 57-59 and accompanying text.

218 *See In re* Seaboard Shipping Corp., 449 F.2d 132, 136 (2d Cir. 1971).

219 456 F.2d 476 (5th Cir. 1972).

220 *Id.* at 480.

221 *Id.* The court noted further that "a violation of a safety regulation may be strong evidence of a breach of [workmanlike performance]," but that the issue of proximate cause is open and subject to proof. *Id.* at 480-81.

222 340 F. Supp. 1220 (S.D. Tex. 1972) (holding that the explosion and death of crew members in the absence of a licensed pilot and valid certificate did not meet the burden of the *Pennsylvania* rule).

223 673 F.2d 91 (5th Cir. 1982).

224 *See id.* at 94 (citing Reyes v. Vantage S.S. Co., 558 F.2d 238 (5th Cir. 1977).

225 *Id.*; *see also In re* Seaboard Shipping Corp., 449 F.2d 132, 136 (2d Cir. 1971).

226 141 F.2d 238 (2d Cir. 1944). For other examples of the rule cited outside the maritime context, see President & Dirs. of Manhattan Co. v. Kelby, 147 F.2d 465, 476 n.24 (2d Cir. 1945); Package Closure Corp. v. Sealright Co., 141 F.2d 972, 979 n.14 (2d Cir. 1944); Martin v. Herzog, 126 N.E. 814, 816 (N.Y. 1920) (Cardozo, J.) (placing the burden upon a buggy driver to overcome the "probative force" of failing to have lights as required by statute); Lewis v. Long Island R.R., 51 N.Y.S. 558, 563 (App. Div. 1898) (Goodrich, J., concurring).

involving the duties of a stock exchange under the Securities Exchange Act of 1934 to take disciplinary action against one of its members, the rule was considered a "useful analogy" in an attempt to shift the burden of proof as to causation to the defendant.[227] In fact, the Supreme Court cited *The Pennsylvania* outside the context of maritime law in *Bigelow v. RKO Radio Pictures*[228] as an example of how the issues of fault and causation are fundamental for establishing liability in the United States common law system. But it seems that the rule was not destined to gain acceptance outside of maritime law, last being cited in a non-maritime case in 1946.[229]

Interestingly, in at least one instance, the rule has been applied to an airplane accident over the high seas. The airline was mandated to show that its violation of a Federal Aviation Administration regulation was not a cause of the accident.[230] The case serves as an interesting example of the rule's extension into an area which borders precariously close to the edge of maritime jurisdiction in a scenario never contemplated by the Court in its formulation of the rule.[231]

227 *Baird*, 141 F.2d at 246 n.5.

228 327 U.S. 251 (1946).

229 *See* Upson v. Otis, 155 F.2d 606, 611 n.5 (2d Cir. 1946); *see also* Daly, *supra* note 2, at 79-80 n.9.

230 *See* Demanes v. Flying Tiger Line, 352 F.2d 494 (N.D. Cal. 1967).

231 *See* Pitts, *supra* note 12, at 563. In *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 268 (1972), the Court held that an action fell within maritime jurisdiction if it had "a significant relationship to traditional maritime activity." More recently, the Court refined this holding in the following manner: In order to assert maritime jurisdiction a court must (1) "assess the general features of the type of incident involved to determine whether the incident has a potentially disruptive impact on maritime commerce"; and (2) "a court must determine whether 'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'" Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995) (quoting Sisson v. Ruby, 497 U.S. 358, 365 (1990)). It will be interesting to see if the rule will be extended again to aviation cases in light of the Court's revisiting of the issue of the extension of maritime jurisdiction.

IV. EVOLUTION OF THE BURDEN NEEDED TO REBUT THE RULE AND ARGUMENTS FOR AND AGAINST THE RULE'S CONTINUED APPLICATION

A. *Changing Standard Under the Rule*

From the time of the rule's inception in 1873 and until 1929, courts that applied the *Pennsylvania* rule held the vessel in statutory violation to the standard of proving that the violation "could not" have caused the collision.[232] By enunciating the rule in such terms, the Court established a burden of proof which equals that imposed upon criminal prosecutors.[233] Notably, Griffin has stated that "[i]t may perhaps be regretted that the word 'could' was employed in the statement of the rule in the Pennsylvania,"[234] because this phrasing has encouraged courts to speculate as to whether a statutory fault might have had any possible connection to the collision.[235] Through the years, courts have been dissatisfied with placing this heavy burden upon a party in a civil case, particularly with the coinciding divided damages rule.[236] Hence, courts in a variety of circuits have periodically discussed and adopted alternate formulations of the *Pennsylvania* rule.

In the 1929 case *The Mabel*,[237] the Second Circuit modified the rule by stating: "All things are indeed possible, but even in applying the [*Pennsylvania* rule] we are limited to *the reasonable probabilities*."[238] No longer would a vessel be required to refute any possible causal connection between the statutory violation and the

232 *See, e.g.*, Richelieu Navigation Co. v. Boston Marine Ins. Co., 136 U.S. 408, 422-23 (1890); *see also* Healy & Sweeney, *supra* note 30, at 340.

233 *See* Daly, *supra* note 2, at 80 n.12. Daly further states that such a burden is justified given the importance of the interests involved, i.e., the safety of life and property at sea. *See id.*

234 GRIFFIN, *supra* note 2, at 472.

235 *See id.*

236 *See supra* text accompanying notes 5-6.

237 35 F.2d 731 (2d Cir. 1929). There are some who point to the Second Circuit's decision in *The Transfer No. 8*, 25 F.2d 628 (2d Cir. 1928), as the beginning of the Second Circuit's amelioration of the rule. *See, e.g.*, Pitts, *supra* note 12, at 579.

238 *The Mabel*, 35 F.2d at 732 (emphasis added). Judge Learned Hand considered the proper burden under the rule to be a showing that the violation did not cause the collision by "beyond a reasonable doubt." National Bulk Carriers v. United States, 183 F.2d 405, 410 (2d Cir. 1950) (Hand, J., dissenting). Based upon this, two interpretations of the trend in the amelioration of the rule have been suggested. First, that the new "reasonableness" standard was merely a rearticulation of the term "could not have." Second, that the new standard meant that the burden under the rule could be met by less than a showing of "beyond a reasonable doubt." Daly, *supra* note 2, at 80 n.12.

collision no matter how remote or unreasonable.[239]

Twenty-five years later, the United States Court of Appeals for the First Circuit adopted this same "reasonableness" standard in *Seaboard Tug and Barge, Inc. v. Rederi AB/Disa*.[240] In 1955, one year after the First Circuit's decision, the Fifth Circuit followed suit in *Compania De Maderas De Caibarien, S.A. v. The Queenston Heights*.[241] Nearly a decade later, in *Esso Standard Oil Co. v. Oil Screw Tug Maluco I*,[242] the Fourth Circuit adopted a reasonableness standard as well. Unfortunately, despite this new formulation of the rule in the First, Second, Fourth, and Fifth Circuits, courts within these circuits have often failed to point out that the rule ought to be applied in the modified version. Rather, they have felt it sufficient to quote the Court's language of "could not," with no discussion of reasonableness.[243] Given that the outcome of a case

239 *See* Zapf, *supra* note 41, at 525. Zapf also cites *United States v. Petroleum Navigation Co.*, 85 F.2d 54 (2d Cir. 1936), in support of the contention that, even in the Second Circuit, the new formulation of the rule was not immediately accepted. *See* Zapf, *supra* note 41, at 525.

240 213 F.2d 772 (1st Cir. 1954). The court stated:

> We cannot believe that the Supreme Court in *The Pennsylvania* intended to establish as a hard and fast rule that every vessel guilty of a statutory fault has the burden of establishing that its fault could not by any stretch of the imagination have had any causal relation to the collision no matter how speculative, improbable or remote . . . that the offending ship has the burden of showing that its statutory fault "could not by any possibility have contributed" to the collision, we nevertheless feel that in applying the rule of *The Pennsylvania* "we are limited to the reasonable probabilities."

Id. at 775 (citations omitted).

241 220 F.2d 120 (5th Cir. 1955); *see also* China Union Lines, Ltd. v. A.O. Anderson & Co., 364 F.2d 769 (5th Cir. 1966).

242 332 F.2d 211 (4th Cir. 1964). The Fourth Circuit has, at times, given the case of *The Martello*, 153 U.S. 64 (1894), a careful reading in order to muster support for the contention that the rule as stated by the Supreme Court was intended to be applied using a "reasonableness" standard. *See* The Fort Fetterman, 261 F.2d 563, 568 (4th Cir. 1958).

243 For examples in the First Circuit, see Havinga v. Crowley Towing & Trans. Co., 24 F.3d 1480, 1483 (1st Cir. 1994); Continental Grain Co. v. Puerto Rico Maritime Shipping Auth., 972 F.2d 426, 436 (1st Cir. 1992); Juno SRL v. S/Y Endeavour, 865 F. Supp. 13, 17 (D. Me. 1994), *aff'd in part rev'd in part*, 58 F.3d 1, 3 (1st Cir. 1995). For examples in the Second Circuit, see *In re* Tug Helen B. Moran, 560 F.2d 527, 529 (2d Cir. 1977); *In re* A. Long, 439 F.2d 109, 113 (2d Cir. 1971); Circle Line Sightseeing Yachts Inc. v. City of New York, 283 F.2d 811, 814 (2d Cir. 1960); Great Am. Ins. Co. v. Tug "Cissi Reinauer," 933 F. Supp. 1205, 1214 (S.D.N.Y. 1996); Moran Towing & Trans. Co. v. Bouchard Trans. Co., 1989 A.M.C. 365 (S.D.N.Y. 1988); *In re* Tug Ocean Prince Inc., 436 F. Supp. 907 (S.D.N.Y. 1977); Barge Poling Bros. No. 23 Inc., v. A.S. Namset, 429 F. Supp. 1315, 1322 (S.D.N.Y 1977); Joseph Navigation Corp. v. Chester, 411 F. Supp. 496 (S.D.N.Y. 1975). In the Fourth Circuit, see Dodgen v. Timmons, 935 F.2d 1286 (4th Cir. 1991); Hellenic Lines, Ltd. v. Prudential Lines, Inc., 730 F.2d 159, 162 (4th Cir. 1984); M/V Bernd Leonhardt v. United States, 393 F.2d 756, 761 (4th Cir. 1968); Magno v. Corros, 439 F. Supp. 592, 598 (D.S.C. 1977). In the Fifth Circuit, see Skidmore v. Gueninger, 506 F.2d 716 (5th Cir.

may depend upon whether the burden of proof under the *Pennsylvania* rule has been met, it seems that courts in these circuits are at times remiss in not specifying that the rule is not to be strictly applied.

The rule has been reinterpreted by the Ninth Circuit as well. In *States Steamship Co. v. Permanente Steamship Corp.*[244] the court explained the rule as follows:

> The ultimate standard of reasonableness is a constant in our common-law system, and through resort to that standard rules of law expressed in the most absolute terms are made subject to exceptions dictated by reason. . . . Hence we read the phrase "could not have been" in The Pennsylvania to mean . . . [that] the burden of proof rests upon [a ship] to establish that the violation could not reasonably be held to have been a proximate cause of the collision. . . . In effect, [the ship] must prove beyond reasonable doubt that the collision would have occurred, even if there was a statutory violation.[245]

In *Trinidad Corp. v. Steamship Keiyoh Maru*[246] the Ninth Circuit revisited the question of what must be shown to satisfy the burden imposed by the *Pennsylvania* rule. In *Trinidad Corp.*, the court recounted the history of this question of interpretation and held that in order to rebut the presumption created by the rule, one must show "by clear and convincing evidence that the violation could not be reasonably held to have been a proximate cause of the collision."[247] But this reinterpretation of the rule, is not the panacea it may appear to be.[248]

B. *Arguments for and Against the Rule*

Since the inception of the rule, courts and academicians have mustered numerous arguments for and against its continued application. Obviously, the ensuing discussion cannot present every reasoned opinion voiced on this issue, but the debate may be generally outlined as follows.

1975); Ingram Barge Co. v. The Valley Line Co., 470 F. Supp. 140, 146 (E.D. Miss. 1979); Clary Towing Co. v. Port Arthur Towing Co., 367 F. Supp. 6 (E.D. Tex. 1973). But, insofar as "reasonableness is a constant in our common law system," one may argue that the reasonableness standard, although not stated in the foregoing cases, is nonetheless implied. State S.S. Co. v. Permanente S.S. Corp., 231 F.2d 82, 87 (9th Cir. 1956).

244 231 F.2d 82 (9th Cir. 1956); *see also* Ranger Ins. Co. v. Exxon Pipeline Co., 760 F. Supp. 97, 99 (W.D. La. 1990); Kaiser v. Traveler's Ins. Co., 359 F. Supp. 90 (E.D. La. 1973).

245 *State S.S. Co.*, 231 F.2d at 86-87; *see also* Pacific Tow Boat Co. v. States Marine Corp., 276 F.2d 745, 749 (9th Cir. 1960).

246 845 F.2d 818 (9th Cir. 1988).

247 *Id.* at 825; *see also* Churchill v. F/V Fjord, 857 F.2d 571, 577 (9th Cir. 1988). Interestingly, the possibility that courts may eventually opt for this lesser standard under the rule was presaged by Daly. *See* Daly, *supra* note 2, at 80 n.12.

248 *See infra* note 309.

It has been noted that the rule has resulted in "judicial rule-bending . . . [and undermining of] judicial integrity" in order to avoid the inequitable results that often accompany application of the rule.[249] Moreover, since a proportionate fault regime allows courts more flexibility in determining fault, rigid presumptions of all kinds are merely "relics of an earlier time" when "there were only rudimentary means of gathering evidence and assembling facts."[250] Therefore, presumptions such as the *Pennsylvania* rule are no longer necessary.[251]

It should be noted, however, that the rule most often caused an inequitable result when it was applied in conjunction with the divided damages rule.[252] "[T]he adoption of proportionate fault should argue for the retention of the rule rather than its abolition, because the harsh possibility of a vessel being held fifty percent to blame for a 'minor' statutory fault has been eliminated."[253] Therefore, one need not be concerned about further "judicial rule bending" because the proportionate fault regime has eliminated the possibility of an inequitable result stemming from the application of the rule.[254]

It has also been suggested that, to the extent that the rule is tied to the divided damages doctrine, with the establishing of a comparative fault system, the rule ought to be eliminated.[255] Put differently, it has been argued that under *Reliable Transfer* the courts should look to the issue of culpability in assessing fault.[256]

249 Goschka, *supra* note 99, at 55 n.28 (citing National Bulk Carriers v. United States, 183 F.2d 405 (2d Cir. 1950)). Goschka contends, in consonance with Learned Hand's dissenting opinion in *National Bulk Carriers*, that the majority paid "lip-service" to the rule, but effectively ignored it. Judge Learned Hand recognized that "the majority was essaying to avoid injustice, but felt that judicial integrity should not be sacrificed to expiate the unfortunate adherence to the divided damages rule." *Id.*; *see also* GILMORE & BLACK, *supra* note 42, at 495-96.

250 2 SCHOENBAUM, *supra* note 40, § 12-3, at 729.

251 *See* Owen, *supra* note 10, at 803.

252 *See supra* text accompanying notes 5-6.

253 Brown, *supra* note 36, at 836; *see also* Rutherglen, *supra* note 99, at 734.

254 *See* Owen, *supra* note 75, at 453-55.

255 *See* Trinidad Corp. v. S.S. Keiyoh Maru, 845 F.2d 818, 825 n.5 (9th Cir. 1988); Crown Zellerbach Corp. v. Willamette-W. Corp., 519 F.2d 1327, 1329 (9th Cir. 1975); *In re* Gypsum Carrier, 465 F. Supp. 1050, 1063 n.8 (S.D. Ga. 1979); Owen, *supra* note 32, at 803 n.251; Pitts, *supra* note 12, at 573; Sager, *supra* note 2, at 1262; Tetley, *supra* note 35, at 128-29.

256 *See* Meadows & Markulis, *supra* note 48, at 37-39.

Therefore, statutory fault only speaks to the degree of culpability and, since the *Pennsylvania* rule has no place in such a scheme, it ought to be overruled.[257]

But simply by framing the argument in the wake of *Reliable Transfer* in terms of "culpability," one cannot avoid the fact that "culpability" and "liability" are synonymous terms.[258] It is well established that the rule does not speak to the issue of culpability/liability, but rather to the issue of causation.[259] Even if a proportionate fault scheme contemplates that issues such as statutory fault are to be viewed as factors in determining the total percentage of liability to be imposed upon a vessel, logic dictates that a causal connection be drawn between the statutory violation and the ensuing collision before any culpability/liability may be imposed,[260] regardless of what percentage of the total damage one may impute to the statutory violation. The *Pennsylvania* rule speaks only to the drawing of this causal connection, nothing more and nothing less.

Following *Reliable Transfer*, there was speculation that the *Pennsylvania* rule would no longer be applicable.[261] As time elapsed, however, even the rule's detractors were hesitant to state that the rule did not survive *Reliable Transfer*.[262] In light of the

257 *See id.* at 39.

258 *See* ROGET'S 21ST CENTURY THESAURUS IN DICTIONARY FORM 442 (Kipfer ed., 1993).

259 *See* discussion *supra* Part II.

260 *See* statement of Judge Cardozo *infra* note 286.

261 *See* Trudy E. Piatek, Note, *Admiralty: The Abandonment of the Division of Damages Rule in Mutual Fault Collisions in Favor of the More Equitable Proportional Rule*, 11 TEX. INT'L L.J. 159, 163 (1976); Brian L. MacDonald, Comment, *Admiralty Law—Damages—The United States Now Follows the Comparative Damages Rule*—United States v. Reliable Transfer, Co., *421 U.S. 397 (1975)*, 10 SUFFOLK U. L. REV. 116, 123-24 (1975), *cited in* Pitts, *supra* note 12, at 546 n.40. In *California v. Italian Motorship Ilice*, 534 F.2d 836, 840 (9th Cir. 1976), the court misconstrued the *Pennsylvania* rule as being the foundation for the divided damages doctrine and, hence, the *Pennsylvania* rule was overruled by *Reliable Transfer*. Whatever the meaning of the *Ilice* decision, the Ninth Circuit believes the rule exists after *Reliable Transfer* as evidenced by its continued application and reinterpretation of the rule. *See* Exxon Co. v. Sofec, Inc., 54 F.3d 570, 577 (9th Cir. 1995); Trinidad Corp. v. Steamship Keiyoh Maru, 845 F.2d 818, 824-25 (9th Cir. 1988); *see also* Pitts, *supra* note 12, at 548-49.

262 *See* Owen, *supra* note 10, at 803 ("Actually, the presumption is not necessarily incompatible with a proportionate fault regime."); Tetley, *supra* note 35, at 146 (stating the rule is "*perhaps* incompatible with the . . . proportionate fault rule of *Reliable Transfer*") (emphasis added).

More recently, however, Owen and Whitman have taken the position that the rule clearly survived *Reliable Transfer* and that now "the rule can, perhaps for the first time, satisfy its original purpose." Owen & Whitman, *supra* note 75, at 454. But this is tempered by their statement that "[t]he argument remains that the *Pennsylvania* rule is unnecessary after *Reliable Transfer*, and that its application requires a rigid approach that violates the generous flexibility of comparative fault. That argument has not found favor in the courts, however . . . ." *Id.* at 455.

post-*Reliable Transfer* cases that have applied the rule, and those cases compiled and analyzed by William L. Peck, the contention that the rule did not survive *Reliable Transfer* can hardly be sustained today.[263]

In discussing the place of the rule in a comparative fault regime the Eleventh Circuit stated that *Reliable Transfer* did nothing to overturn the *Pennsylvania* rule, but instead simply eased the rule's harshness.[264] Prior to *Reliable Transfer*, a ship unable to overcome the *Pennsylvania* rule bore an equal proportion of the liability; after *Reliable Transfer*, a ship that violated a statutory rule is only liable in proportion to the comparative degree of fault for the accident. The goals underlying the *Pennsylvania* rule—a concern that maritime rules be strictly observed—were not in the least bit disturbed by the *Reliable Transfer* decision.[265]

One might argue that the rule is incompatible with a system of proportionate fault in that some courts have understood that the rule "makes [a] defendant's statutory violation presumptively *the sole cause* and fault of the allision."[266] Similarly, the Fourth Circuit has held that under the rule, the vessel will be held "solely at fault" unless she musters sufficient evidence to rebut the rule's presumption.[267] It is submitted that this view of the rule is misguided. Even under a divided damages regime, a vessel found to be in statutory fault would only be responsible for one-half the damages, not the entire amount.[268] Moreover, Justice Strong's original phrasing of the rule states that the burden rests upon the violator to "show[] not only that her fault might not have been *one of the causes* . . .

263 *See generally* Peck, *supra* note 6 (outlining and discussing the application of the rule in cases after *Reliable Transfer*); Owen & Whitman, *supra* note 75, at 449-55 (same).

264 *See* Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540, 1555 (11th Cir. 1987).

265 *See id.*; *see also* Dahlia Maritime Co. v. M/S Nordic Challenger, 1994 A.M.C. 2208, 2213 (1993) ("[W]hen it has completed its factual findings, the court may determine that the Pennsylvania rule applies . . . and damages may be assessed in accord with the principles of comparative negligence, as per *Reliable Transfer*.").

266 Texas E. Transmission Corp. v. Tug Captain Dann, 898 F. Supp. 198, 206 (S.D.N.Y. 1995) (emphasis added). The term "allision" means "the action of dashing against or striking with violence upon; thus in admiralty law an allision is the contact between a moving vessel and a stationary object such as a bridge, pier, wharf, or shore side installation." 2 SCHOENBAUM, *supra* note 40, § 14-1, at 254; *see also* Weyerhaeuser Co. v. Atropos Island, 777 F.2d 1344, 1346 n.1 (9th Cir. 1985); Great Am. Ins. Co. v. Tug "Cissi Reinaur," 933 F. Supp. 1205, 1214 n.2 (S.D.N.Y. 1996).

267 *See* Bradshaw v. The Virginia, 176 F.2d 526, 530 (4th Cir. 1949).

268 *See supra* note 2.

but that it could not have been."[269] Hence, the Court never contemplated that the rule would presumptively place sole responsibility upon the vessel in statutory violation. It is clear that the divided damages regime created in *Reliable Transfer* does not negate the application of the *Pennsylvania* rule.

It has been argued that the rule is based upon the Supreme Court's erroneous reading of British statutes and, in any event, the rule has been so attenuated by the condition/cause distinction,[270] the circuit court's addition of "reasonableness,"[271] and the doctrines of last clear chance,[272] error in extremis,[273] and major-minor fault,[274] that it ought to be overruled.[275] Insofar as the rule is based upon a misreading of British statutes, history has made this fact irrelevant. Moreover, the Court's intent was to establish a general proposition of maritime law, not to interpret British law.[276]

The argument that the rule has been severely attenuated—even if sustainable at one time—is no longer persuasive. The doctrines of "last clear chance" and major-minor fault have been removed from maritime jurisprudence in light of *Reliable Transfer*.[277] Error in extremis—which predates the *Pennsylvania* rule by over twenty years[278] and, therefore, cannot be construed as a reaction to the rule—is simply a circumstance in which a court finds that there is no statutory fault and, therefore, the rule never begins to operate. The condition/cause distinction is a dubious one at best, and fails in any case because the cases that have attempted to apply this doctrine have in fact misapplied the *Pennsylvania* rule.[279] Moreover, it is submitted that courts only opted for this distinction in order to avoid inequitable results under the divided damages rule. Hence, it is unlikely that, under a proportionate fault regime, the doctrine will often come into play for the purpose of "attenuating" the *Pennsylvania* rule. Finally, since "reasonableness is a constant in our common law system"[280] it is likely that the Court

269 The Pennsylvania, 86 U.S. (19 Wall.) 125, 136 (1873) (emphasis added).
270 *See supra* Part II.C.
271 *See supra* Part IV.A.
272 *See supra* Part II.A.
273 *See supra* Part II.E.
274 *See supra* Part II.D.
275 *See* Tetley, *supra* note 35.
276 *See* Pitts, *supra* note 9, at 577; *see also supra* notes 35-37 and accompanying text.
277 *See supra* Part II.A & D.
278 *See supra* text accompanying notes 106-07.
279 *See supra* Part II.C.
280 The Mabel, 35 F.2d 731, 732 (2d Cir. 1929); *see also supra* text accompanying notes 238-39.

intended the rule to be applied within the context of a reasonableness standard. Even if this is not so, can it truly be said that the injection of such a standard is sufficient, without more, to lend support to the view that the rule has been so attenuated that it ought to be disguarded? On these grounds, the attenuation argument fails.

It also has been suggested that the rule is deficient in that it "treat[s] all rules of navigation as if they were equal in importance, [and] obscures the way in which the rules differ in their general significance and as applied to the facts of each case."[281] While it is true that the *Pennsylvania* rule makes no distinction between the importance of the navigational rules that might fall within the rule's purview, it is difficult to understand how this is to be construed to support the position that the rule should be abandoned. Since the rule speaks only to the issue of causation, and not liability, we must be careful not to place the carriage before the horse. Once causation in fact is established, the court can then move to the issue of proximate cause,[282] which is where the rule properly comes into play, and imposes legal liability. Once proximate cause is determined, an assessment of damages based upon proportionate fault and considering, inter alia, the importance of the statutory violation involved, can proceed. It is at this juncture that the court may evaluate the significance of the statutory violation and apportion damages accordingly. It is neither the place nor the purpose of the rule—which speaks only to causation—to categorize or weigh the importance of a particular statute.

Recently, Professor Rutherglen has contended that the function of the rule in maritime law can be better accomplished by replacing the rule with the doctrine of negligence per se:[283]

> The ordinary doctrine of negligence per se creates an irrebuttable presumption of negligence from violation of the rules of navigation; the rule of The Pennsylvania adds only the rebuttable presumption of causation. Yet it is precisely in this respect that The Pennsylvania rule is unnecessary. The opinion in The

281 Rutherglen, *supra* note 99, at 738.
282 As Prosser and Keeton have stated:
> Once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question whether the defendant should be held legally responsible for the injury. The term "proximate cause" is applied by the courts to those more or less undefined considerations which limit liability even where the fact of causation is clearly established.

W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 272 (5th ed. 1984).
283 *See* Rutherglen, *supra* note 99, at 734, 738-47.

> Pennsylvania justified the presumption of causation by emphasizing the importance of the rules of navigation. What recent cases have failed to note is that a presumption on the issue of causation adds little to the usual incentives to comply with rules of navigation. . . . The doctrine of negligence per se is sufficient to give the rules of navigation the prominent role they deserve.[284]

The doctrine of negligence per se is used to establish the existence of a duty between two parties and the breach thereof. The *Pennsylvania* rule only begins to operate once these issues have been resolved.[285] Keeton has noted that, even once negligence per se is established "[t]here will still remain open such questions as the causal relationship between the violation and the harm to the plaintiff."[286] The argument that the purpose of the rule can still be accomplished by eliminating the intermediary step of surmounting a presumption of causation is not sustainable.

The purpose of the rule is grounded in deterrence.[287] Logically, given that the doctrine of negligence per se and the *Pennsylvania* rule speak to two separate and distinct elements of a party's case, it is difficult to support the conclusion that an additional burden on this separate issue of causation does not create a greater deterrence effect.[288] It is true that

> owners and operators of American vessels are likely to know of the rules of navigation, but not the technical effect of the rule of The Pennsylvania on the issue of causation. And the owners and operators of foreign vessels, of course, are not likely to be aware that the rule even exists because it is unique to American

284 *Id.* at 741. Others have also cast the rule in terms of negligence per se, although without the thorough analysis provided by Professor Rutherglen. *See* G. Hamp Uzelle, III, *Liability of Wharfingers, Fleeters, and Bailers*, 70 TUL. L. REV. 647, 665 (1995).

285 *See* Daly, *supra* note 2, at 79.

286 KEETON ET AL., *supra* note 282, § 36, at 230. Judge Cardozo distinguished the concepts of negligence and causation in *Martin v. Herzog*, 126 N.E. 814, 816 (N.Y. 1920), in the following manner: "We must be on our guard . . . against confusing the question of negligence with that of the causal connection between the negligence and the injury. A defendant who travels without lights is not to pay damages for his fault unless the absence of lights is the cause of the disaster."

287 Rutherglen states that: "The purpose must be recast, however, as that of enhancing deterrence beyond the level achieved by the doctrine of negligence per se." Rutherglen, *supra* note 99, at 746.

288 One might represent this point in the following manner:

Let X = deterrence created by the doctrine of negligence per se.

Let Y = deterrence created by the *Pennsylvania* rule.

Provided that Y has some positive effect on deterrence—and Rutherglen does not claim that this is not so—then $X + Y$ must create greater deterrence then X alone.

law.[289]

As a practical matter however, shipowners issue manuals to their captains which very often outline relevant rules and the consequences for breach.[290] While it is not likely that such a manual would explicitly mention the *Pennsylvania* rule, it is likely that the captain will be informed of the great importance of the statutory rules and that, in the event of a collision, he will be held at fault if he cannot prove that any statutory violation did not cause the accident. Hence, the *Pennsylvania* rule should, as a practical matter, add more to the deterrence effect than would be created by negligence per se alone.

In addition to these arguments is the fact that application of the doctrine of negligence per se in maritime would undermine the fundamental goal of uniformity in maritime law. It is well established that maritime law is intended to function uniformly throughout the United States.[291] The constitutional extension of admiralty and maritime jurisdiction to Congress came with well recognized limitations, one of which was that admiralty and maritime law "shall be co-extensive with and operate uniformly in the whole of the United States."[292]

By contrast, the doctrine of negligence per se, as with tort law generally, has been developed in the context of state law.[293] Hence, the manner in which it is to be applied, and its effect on the issue of causation, has met with a wide variety of interpretations.[294]

289 Rutherglen, *supra* note 99, at 746; *see also* Thompson, *supra* note 35, at 228 n.25.

290 *See, e.g.*, Great Am. Ins. Co. v. Tug "Cissi Reinauer," 933 F. Supp. 1205, 1215 (S.D.N.Y. 1996) (noting that the Reinauer Tugboat Company issued manual that contained, inter alia, legal consequences of causing swells).

291 *See* Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 160 (1920) (holding state laws and jurisprudence may not be applied in a fashion which would "contravene the essential purposes of, or to work material injury to, characteristic features of [the maritime] law or to interfere with its proper harmony and uniformity in its international and interstate relations"); Southern Pacific Co. v. Jensen, 244 U.S. 205, 216 (1917); The Lottawana, 88 U.S. (21 Wall.) 558, 575 (1875); *see also* MARTIN J. NORIS, THE LAW OF SEAMEN 4-5 (4th ed. 1985); *cf.* Baggett v. Richardson, 342 F. Supp. 1024 (E.D. La. 1972) (noting that in a case involving assault and battery on navigable waters, state law applied since it did not interfere with the proper harmony and uniformity of maritime law). For the opposing view, i.e., that uniformity in maritime law does not exist as a practical matter, see Robert D. Reltz, *The Myth of Uniformity in Maritime Law*, 21 TUL. MAR. L.J. 103 (1996).

292 *Panama R.R. Co.*, 264 U.S. at 386.

293 *See* KEETON ET AL., *supra* note 282, § 36, at 229-34 and cases cited therein.

294 Compare Keeton's statement that "once [a statutory breach] has been established, probably a majority of the courts hold that the issue of negligence is thereupon conclusively determined, *in the absence of sufficient excuse*," *id.* at 230 (emphasis added), with Rutherglen's understanding that the doctrine of negligence per se creates an "irrebuttable

A federal court presiding over a maritime collision case would be faced with the additional burden of determing which state's interpretation of the doctrine of negligence per se should be applied. This burden would be excacerbated in cases involving foreign vessels. And, even if such a decision could be reached on the basis of choice of law rules, uniformity of maritime law would be destroyed. Therefore, the doctrine of negligence per se cannot properly replace the *Pennsylvania* rule.

Finally, it has been noted that The International Convention for the Unification of Certain Rules in Regard to Collisions ("Brussels Convention") eliminated all presumptions of fault in maritime collisions.[295] The majority of seafaring nations have adopted the recommendations of the Brussels Convention and, hence, the United States is out of step with the majority of the world's maritime nations.[296] In this context, adhering to the rule encourages international forum shopping,[297] and creates unnecessary conflicts of law.[298] This, combined with the wide variety of lower court interpretations of the rule, has resulted in the rule becoming unmanageable, and overruling *The Pennsylvania* would serve to further uniformity in both domestic and international law.[299]

With respect to the rule's incompatibility with the Brussels Convention, it has been noted that the Convention eliminated statutory presumptions and not judge made presumptions such as the *Pennsylvania* rule.[300] Hence, even if the United States were to

presumption of negligence." *See supra* note 284.

It is worth noting that, if a court were to adopt the understanding of negligence per se suggested by Rutherglen, i.e., that negligence per se creates an *irrebuttable* presumption, replacing the *Pennsylvania* rule with the doctrine of negligence per se would impose a burden upon the statutory violator far more onerous than the burden imposed by the *Pennsylvania* rule.

295 *See* Pitts, *supra* note 12, at 575.

296 By 1957, the following nations had adopted the Brussels Convention: Argentina, Australia, Belgium, Brazil, Canada, Denmark, Egypt, France, Germany, Great Britain, Greece, India, Italy, Japan, Mexico, The Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Spain, Sweden, U.S.S.R., Uruguay, and Yugoslavia. *See* Tank Barge Hygrade, Inc. v. The Tug Gatco, 250 F.2d 485, 488 (3d Cir. 1957). While the United States was in fact a signatory of the treaty they have not become parties despite the fact that at least 85 countries had become parties by 1995. *See* M.J. BOWMAN & D.J. HARRIS, MULTILATERAL TREATIES INDEX AND CURRENT STATUS 35 (1984); *id.* at 151 (11th Ann. Supp. 1995) (adding three parties to Treaty 52).

297 *See* 2 SCHOENBAUM, *supra* note 40, § 12-3, at 729; Healy & Sweeney, *supra* note 48, at 348; Pitts, *supra* note 12, at 575; Tetley, *supra* note 35, at 138.

298 *See* Tetley, *supra* note 35, at 138.

299 *See* Healy & Sweeney, *supra* note 30, at 348; Owen, *supra* note 10, at 803.

300 "The Brussels Convention eliminated 'presumptions of fault in regard to liability for collision,' but such statutory presumptions of fault differ from the Pennsylvania rule's non-statutory presumption of causation." Owen & Whitman, *supra* note 75, at 453 n.47 (citing Ishizaki Kisen Co. v. United States, 510 F.2d 875 (9th Cir. 1975)).

adopt the Convention at this late date, the rule would not be affected. The remaining grievances, particularly the inconsistent interpretation and application of the rule by lower courts,[301] as well as the tendency the rule has to encourage forum shopping and conflicts of law, can only be addressed by a new formulation of the rule.

The arguments in opposition to the rule, with limited exceptions, fail. Moreover, the underlying policy behind the rule—the need for maritime safety—is more pressing today in a sea crowded with both pleasure craft and commercial vessels than it was when the Court first enunciated the rule.[302] Further, there is no economically practical alternative to encourage adherence to maritime statutes other than such a rule.[303] It should be remembered that in maritime cases "we are not here dealing with the comparatively stable institutions on terra firma on which our common law was developed, but with that peculiar class of relationships of human beings and cargo afloat on a vessel, always likely to be in dangerous waters."[304] Unlike on land, it is rare to have a disinterested witness to a maritime collision or stranding.[305] Therefore, in addition to these reasons for keeping the rule, if clarified, modified, and applied uniformly, the rule can provide a convenient mechanism for courts to simplify the adjudication of collision cases.[306]

V. PROPOSAL FOR A MODIFIED RULE

The Supreme Court needs to recast the *Pennsylvania* rule in order to incorporate the better considered lower court interpretations and developments and set forth a process by which lower courts can apply the rule in a uniform manner.[307] The Court may

301 It is well established that, in regard to the courts maritime jurisdiction "the Constitution must have referred to a system of law co-extensive with, and operating uniformly in, the whole country." The Lottawana, 88 U.S. 558, 575 (1875). It is clear from the foregoing discussion that the rule has run afoul of this basic premise.

302 *See* Brown, *supra* note 36, at 838; Daly, *supra* note 2, at 110; Peck, *supra* note 6, at 102; Zapf, *supra* note 41, at 539.

303 *See* Pitts, *supra* note 12, at 569-70 (arguing that it is not economically feasible to put inspectors on each vessel).

304 The Denali, 112 F.2d 952, 958 (9th Cir. 1940).

305 *See* Pitts, *supra* note 12, at 570 n.235.

306 *Cf.* Board of Comm's v. M/V Farmsum, 574 F.2d 289, 297 (5th Cir. 1978); Ishizaki Kisen Co. v. United States, 510 F.2d 875, 879 (9th Cir. 1975).

307 Rutherglen has succinctly pointed out that:

A decision by the Supreme Court is necessary because the lower federal courts

opt to use language substantially similar to the following:

> In maritime collision cases, when one or both vessels are found, by a preponderance of the evidence, to be in violation of any statute that imposes a mandatory duty for the purposes of avoiding marine collissions, and the injury suffered is one contemplated by that statute, the *Pennsylvania* rule will apply in assessing the issue of proximate cause. This procedural device requires, in the absence of a superceding statutory burden of proof scheme, that the violator(s) produce evidence, and persuade the court by a preponderance of the evidence, that the statutory breach was not one of the causes of the collision. Given the difficulties inherent in determining the cause of maritime collisions, and the importance of maritime safety rules in a time when waterways and seas are crowded with vessels of commerce and pleasure, such a rule is necessary to encourage adherence to the mandate of the statute. Once the court determines that the violation was one of the proximate causes of the collision, the court may then proceed to assess the proportion of liability that may accompany the violation.

This phrasing of the rule expands the application of the rule in certain respects, and limits its application in others. The first sentence is careful to establish the instances in which the rule should be made to apply, i.e., even to both vessels and regardless of the origin of the statute whether federal, state, local or foreign, as long as the statute is one concerned with avoiding maritime collisions,

---

are powerless to depart from its decisions and because Congress is not at all likely to act on such an isolated issue of collision law. To be sure, this does not loom large on the national agenda like issues of abortion, capital punishment, or even taxation of interstate commerce . . . . [At the same time however,] collision cases comprise a significant part of the admiralty docket.

Rutherglen, *supra* note 99, at 747-48. The Court recently decided a collision case which originated in the Ninth Circuit. *See* Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830 (1996). The Court's landmark decision held that the doctrine of superceding cause is applicable in maritime collision cases. Interestingly, the Ninth Circuit applied the *Pennsylvania* rule pursuant to its understanding that the burden under the rule can be met with clear and convincing evidence. *See* Exxon Co., U.S.A. v. Sofec, Inc., 54 F.3d 570, 577 (9th Cir. 1995). Although *The Pennsylvania* was cited by the parties as well as amicus curiae, *see* Petitioners' Reply Brief on the Merits, *Exxon* (No. 95-129), *available in* 1996 WL 84600; Hiri Respondents' Brief on the Merits, *Exxon* (No. 95-129), *available in* 1996 WL 53643; Maritime Law Assoc. of the United States Amicus Curiae Brief, *Exxon* (No. 95-129), *available in* 1996 WL 15722; Brief for Third Party Respondents and for Respondent Sofec, Inc., *Exxon* (No. 95-129), *available in* 1996 WL 49220, this interpretation was not called into question. Since the Court made no mention of *The Pennsylvania* one might conjecture that the Court has tacitly accepted the Ninth Circuit interpretation. This conclusion would be erroneous. The rule could not be properly called into question for the trial court specifically determined that the defendants committed extraordinary negligence and would be liable even apart from their failure to meet their burden under the rule. *See* Brief for Third-Party Respondents, *Exxon* (No. 95-129), 1996 WL 49220, at *37 n.28.

sets forth a mandatory duty, and is intended to prevent the injury that occurred.

The second sentence, by categorizing the rule as a procedural device,[308] allows for the rule's application to vessels that collide in foreign waters. At the same time, however, by lessening the burden of proof needed to rebut the presumption to "a preponderance of the evidence," the rule is more in conformity with other maritime presumptions, and with the burden of proof in civil cases in general. Moreover, by making the burden under the rule easier to meet, it is more likely, given technological advances, that the burden will be met and hence, judicial essaying to avoid the rule, as well as forum shopping, will be discouraged.[309] In instances where this lesser burden cannot be met, it seems equitable that the statutory violator be held accountable for the proportionate damage occasioned by his infraction.

The proposed modification then makes the policy behind the rule clear and, in light of that policy, the rule will apply to commercial and pleasure craft alike. Also, this reiteration of the rule, on two occasions, explains that the rule speaks to the issue of proximate cause.[310] Finally, the statement concludes with an explanation of how the rule is intended to function in a proportionate fault scheme.

CONCLUSION

The scheme of mutual fault equal division of damages and the disparate application of the rule by lower courts has led to valid criticisms of the rule, and the suggestion by many that the rule no

---

308 It cannot be argued, as was suggested in *Ishizaki Kisen Co. v. United States*, 510 F.2d 875 (9th Cir. 1975), that because the rule encompasses both the burdens of production and persuasion the rule is not properly categorized as one of procedure. *See supra* text accompanying notes 53-56. In maritime law, it is not uncommon to view rules that shift both burdens as rules of procedure. For example, the Ninth Circuit has explained that the *Louisiana* rule shifts both the burden of production and the burden of persuasion to the drifting vessel. *See* Hood v. Knappton Corp., 986 F.2d 329, 330-31 (9th Cir. 1993). There the court went on the explain that "the Louisiana rule is a *procedural principle* which is inextricably linked to the substantive maritime goal which it promotes." *Id.* at 331 (emphasis added). Finally, in support of this final contention the court cited other similar examples, one of which was the *Pennsylvania* rule. *See id.* at 331 n.2.

309 Adoption of a "clear and convincing" standard, as has been suggested by the Ninth Circuit in *Trinidad Corp. v. Steamship Keiyoh Maru*, 845 F.2d 818, 825 (9th Cir. 1988), *see supra* notes 246-48 and accompanying text, is a step in the direction needed to reduce forum shopping. But, as it is still a standard more stringent then usually found in civil cases, it is less likely to do so. Moreover, this standard would be more likely to encourage judicial essaying than would the more common standard of preponderance of the evidence.

310 *See supra* note 282.

longer serves a purpose in American maritime jurisprudence. But, with the shift to a contributory fault system, the rule provides the most effective, economical, and manageable method of encouraging adherence to maritime safety statutes. The problems that have arisen as a result of the long history of uneven and inconsistent judicial application of the rule can be remedied by the Court by adopting the modifications suggested in this Note. With these modifications, seamen can be afforded the maximum protection from injuries and damages in collision cases that result from a statutory breach, while at the same time ensuring an equitable result in a given case.

Michael Ben-Jacob